86 - 1084

No. .....

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

HARLAN E. BOYLES, *et al.*,

Petitioners,

v.

ROBERT P. ALMOND, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HONORABLE LACY H. THORNBURG
Attorney General of
North Carolina

REGINALD L. WATKINS
Special Deputy Attorney General

NORMA S. HARRELL
Assistant Attorney General
Counsel of Record

N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-6026

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does the Eleventh Amendment to the Constitution of the United States bar an official-action suit brought in federal court under 42 U.S.C. § 1983 against officials and trustees of the Teachers' and State Employees' Retirement System of North Carolina, a state agency entitled to assert the defense of sovereign immunity in state courts?

2. Does the Eleventh Amendment to the Constitution of the United States protect the Teachers' and State Employees' Retirement System of North Carolina, a state agency entitled to assert the defense of sovereign immunity in state courts, from liability based on a pendent equitable claim in an official-action suit brought under 42 U.S.C. § 1983?

3. Is the Teachers' and State Employees' Retirement System of North Carolina equitably required to refund unsegregated "employer contributions" paid into the Retirement System because of membership of licensed visually-impaired vending stand operators on the grounds that the North Carolina Department of Human Resources wrongfully deducted the employer contributions from stand proceeds in violation of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.*, when the Retirement System has received only the amount of money required under state law, which does not permit a refund of employer contributions to anyone under any circumstances?

LIST OF PARTIES

The petitioners in this case are the North Carolina State Treasurer, Harlan E. Boyles, Chairman of the Board of Trustees of the Teachers' and State Employees' Retirement System (hereinafter "the Retirement System"); E. T. Barnes, Deputy Treasurer of the State of North Carolina and Director of the Retirement System; and members of the Retirement System's Board of Trustees. (Eugene Ballard, Ezra A. Bridges, M. L. Byrd, William C. Covington, Jr., Withers Davis, Colleen Jakes, Horace Jernigan, Dan W. Jones, V. Glenn Morton, A. Craig Phillips, Theo H. Pitt, Jr., and Linda I. Rader). The respondents in this matter are Robert P. Almond, Jerry A. Calloway, Vernon G. Cox, Allen G. Dail, Janice D. Decker, David W. Guthrie, Brenda M. Herring, Sherman L. Lewis, Janice E. Osborne, Leslie T. Simpson, and the class of present and former vending stand operators whom they represent.

Also parties below, but not named parties herein, were the Secretary of the North Carolina Department of Human Resources; the Director of the Division of Services for the Blind, North Carolina Department of Human Resources; and the Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources. Petitioners believe these parties have no interest in the outcome of the petition and are notifying the Clerk of this belief by separate letter with copies to all parties below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	22

APPENDICES

A.	Opinion and Judgment of Fourth Circuit Court of Appeals 6/6/86	A- 1
B.	Order Denying Petition for Rehearing, 10/3/86	A-16
C.	Order Recalling and Staying Mandate, 10/29/86	A-18
D.	Opinion and Order of U.S. District Court for Eastern District of North Carolina, 6/24/86	A-19
E.	Judgment of U.S. District Court, 6/27/86	A-32
F.	Constitutional and Statutory Provisions Involved	A-35

TABLE OF AUTHORITIES

Page

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. —, 105 S.Ct. 342, 87 L.Ed.2d 171 (1985) 10, 15

Blake v. Kline, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) 14

Clark v. Tarrant County, Texas, 798 F.2d 736 (5th Cir. 1986) 16

Cory v. White, 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982) 10, 14, 20

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) 14

Fincher v. State of Florida, Department of Labor and Employment Security—Unemployment Appeals Comm., 798 F.2d 1371 (11th Cir. 1986) (*per curiam*) 18

Florida Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (*per curiam*) 10, 12

Fouche v. Jekyll Island-State Park Authority, 713 F.2d 1518 (11th Cir. 1983) 19

Gardner v. Retirement System, 226 N.C. 465, 38 S.E.2d 314 (1946) 16

Green v. Mansour, 474 U.S. —, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) 10, 14, 15

Guthrie v. Ports Authority, 306 N.C. 522, 299 S.E.2d 618 (1983) 13

Hall v. Medical College at Toledo, 742 F.2d 499 (6th Cir. 1984) 18

Jensen v. State Bd. of Tax Comm., 763 F.2d 272 (7th Cir. 1985) 19

TABLE OF AUTHORITIES—Continued

Page

Lewis v. Louisiana State Bar Assn., 792 F.2d 493 (5th Cir. 1986) 17

McDonald v. University of North Carolina, 299 N.C. 457, 263 S.E.2d 578, *reh. denied* 300 N.C. 380 (1980) 13

Oneida County v. Oneida Indian Nation, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) 20

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (*Pennhurst II*) 10, 15, 19, 20

Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637, *app. dismissed, disc. rev. den'd*, 310 N.C. 626, 315 S.E.2d 692 (1984) 12

State v. Davis, 270 N.C. 1, 153 S.E.2d 749, *cert. denied*, 389 U.S. 828 (1967) 16

Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183 (5th Cir. 1986) 17

North Carolina General Statutes

N.C. Gen. Stat. § 135-6(a) 11

N.C. Gen. Stat. § 135-6(b) 11

N.C. Gen. Stat. § 135-6(c) 11

N.C. Gen. Stat. § 135-6(d) 11

N.C. Gen. Stat. § 135-6(g) 11

N.C. Gen. Stat. § 135-6(i) 11

N.C. Gen. Stat. § 135-6(j) 11

N.C. Gen. Stat. § 135-7(a), (c) 11

N.C. Gen. Stat. § 135-8(f)(2)a 11

TABLE OF AUTHORITIES—Continued

Pages

N.C. Gen. Stat. §§ 143A-6(b), (c) 11

N.C. Gen. Stat. § 143A-34 11

CONSTITUTIONAL PROVISIONS

North Carolina Constitution, Art. V, § 6 13

United States Constitution, Eleventh Amendment ..... *passim*

MISCELLANEOUS

D. Dobbs, *Handbook on the Law of Remedies*, § 4.1 (1978) 21

No. _____

In The
Supreme Court of the United States
October Term, 1986

HARLAN E. BOYLES, *et al.*,

Petitioners,

v.

ROBERT P. ALMOND, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Attorney General of North Carolina, on behalf of Harlan E. Boyles, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 6, 1986.

OPINIONS BELOW

The opinion and judgment of the court of appeals (Appendix A at A-1-15) is reported at 792 F.2d 451. The

order of the court of appeals denying a Petition for Rehearing and Suggestion for Rehearing In Banc (Appendix B at A-16-17) is unreported, as is the court of appeals' order recalling and staying the mandate (Appendix C at A-18). The order of the district court (Appendix D at A-19-31) is reported at 612 F. Supp. 223. The final judgment of the district court is unreported. (Appendix E at A-32-34).

JURISDICTION

The opinion and judgment of the court of appeals (Appendix A at A-1-15) was entered on June 6, 1986. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on October 3, 1986. (Appendix B at A-16-17). No order extending the time in which to file a Petition for Writ of Certiorari has been entered. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and within the time provided under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

This case also involves selected North Carolina constitutional and statutory provisions, reproduced in Appendix F at A-35-54.

STATEMENT OF THE CASE

Respondents are visually handicapped persons presently or formerly licensed as vending stand operators in a program administered by the North Carolina Department of Human Resources pursuant to the Randolph-Sheppard Act, 20 U.S.C. § 107 et seq. Petitioners are the Treasurer of the State of North Carolina, who is by law the Chairman of the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina, hereinafter the "Retirement System"; the Director of the Retirement System, who is a Deputy State Treasurer and Director of the Retirement Systems Division of the Department of the Treasurer, which provides administrative or staff services to the Retirement System; and members of the Board of Trustees of the Retirement System.

In 1971, the North Carolina General Assembly enacted legislation declaring licensed visually impaired vending stand operators to be state employees and enrolling them in the Retirement System. See N.C. Gen. Stat. § 135-16.1 (a), (b), Appendix F at A-52. Thereafter, until subsequent legislation in 1983, all licensed vending stand operators in North Carolina were contributing members of the Retirement System. In 1983, the North Carolina General Assembly enacted legislation restricting participation in the Retirement System to vendors already enrolled and

allowing those vendors who had been participating to make an election (1) to continue participation contributing both employer and employee contributions; (2) to terminate contributions and receive a return of their accumulated employee contributions with interest at the statutory rate; or (3) to terminate contributions and receive any benefits for which they might qualify then or later. N.C. Gen. Stat. § 135-16.1(c), Appendix F at A-53. Respondents have either withdrawn their employee contributions or wish to do so. They also claim they are entitled to recover the amount paid in as employer contributions because of their membership.

Respondents filed suit on February 17, 1984, in the United States District Court for the Eastern District of North Carolina against the Petitioners herein and against the Secretary of the North Carolina Department of Human Resources; the Director, Division of Services for the Blind, Department of Human Resources; and the Chief of Business Enterprises, Division of Services for the Blind. The complaint invoked the jurisdiction of the district court under 42 U.S.C. § 1983, 28 U.S.C. § 2201, 28 U.S.C. § 1331, 28 U.S.C. § 1343, the Fourteenth Amendment to the Constitution of the United States, and pursuant to principles of pendent jurisdiction.

The Teachers' and State Employees' Retirement System of North Carolina is established and operated under N.C. Gen. Stat. § 135-1 et seq. As a general principle, any permanent full-time "teacher" or state "employee" must participate in the Retirement System. The word "teacher" is defined essentially to include all employees of public educational institutions or entities in North Carolina, including local public school systems and institutions of

higher education. N.C. Gen. Stat. § 135-1(25), Appendix F at A-36.

For each participant or member, monthly employer and employee contributions are paid by the employing unit into the Retirement System. The employee contribution is deducted from the salary of each member at a rate set by statute, which has been 6% since July 1, 1975. N.C. Gen. Stat. § 135-8(b), Appendix F at A-46. The vendors' employee contributions were deducted from the gross pay distributed to them. Employee contributions are credited to a specific fund, the Annuity Savings Fund, along with statutory interest at a rate not to exceed 4%, to the individual accounts of the members from whose salaries they are deducted. N.C. Gen. Stat. § 135-8(b)(1), (2), Appendix F at A-45-46. If a member leaves service or dies under circumstances such that no monthly benefit is payable, the member's accumulated contributions in the Annuity Savings Fund may be paid to him, his designated beneficiary or his estate, whichever is applicable. N.C. Gen. Stat. § 135-5(f), Appendix F at A-36-37. The term "accumulated contributions" is defined as the sum of the amounts deducted from his compensation, credited to his individual account in the Annuity Savings Fund, plus regular interest provided by statute. N.C. Gen. Stat. § 135-1(1). Appendix F at A-35-36. It is this amount which the 1983 legislation authorized the vending stand operators to withdraw upon ceasing further contributions if they chose not to retire or leave their contributions in place for a future benefit.

The employer contribution rate at the time this case was decided in the district court totaled 9.12% of payroll. Appendix D at A-22. While statutes specify that the em-

ployer contribution rate is to be set annually by the Board of Trustees, in practice the General Assembly sets the rate in the annual appropriations acts by which it appropriates money for salaries of state employees and appropriates money to state educational agencies for distribution to local public educational systems and entities for payment of salaries for teachers and other employees.

Employer contributions are paid monthly by each employing unit in a lump sum amount. The Retirement System does not receive a schedule of employer contributions according to individual members, but merely receives the payment with a calculation based on the total payroll from that unit for that month. Employer contributions are then deposited into the Pension Accumulation Fund, which includes all monies held by the Retirement System except those credited to individual accounts in the Annuity Savings Fund, as set out above. All earnings are credited to the Pension Accumulation Fund with an annual transfer to the Annuity Savings Fund of the statutory interest provided for employee contributions. Further, when an individual retires or dies under circumstances such that a monthly benefit is payable, the individual's account in the Annuity Savings Fund is transferred into the Pension Accumulation Fund. All monies in the Pension Accumulation Fund are held and managed on an aggregate basis, with no segregation or accounting even according to individual employing unit. No monies are ever refunded from the Pension Accumulation Fund.

The General Assembly never appropriated any separate funds for payment of employer contributions for vending stand operators. At least in recent years, the an-

nual appropriations acts have specified what has apparently always been the practice, that employer contributions come from the same source of funds as the respective employees' salaries. Thus, the Department of Human Resources withheld employer contributions from vending stand proceeds since the vendors' compensation came from stand proceeds. Respondents herein claimed that the Randolph-Sheppard Act, under which the vending stand program was operated, restricted the state in what it could deduct from stand proceeds before payment to the vendors. Specifically, retirement or fringe benefit programs were not among the purposes for which stand proceeds could be set aside prior to 1974. Beginning in 1974, stand proceeds could be set aside for retirement benefits after a majority vote of the licensees, but no such vote was ever held in North Carolina.

In a Memorandum Opinion and Order filed June 25, 1985, the district court awarded summary judgment to Respondents on the grounds that the Department of Human Resources had violated the Randolph-Sheppard Act when it paid the vendors' employer contributions with money deducted from stand proceeds. Appendix D at A-23. Aside from attorneys' fees and costs, no monetary relief was sought from the Department of Human Resources defendants.

No violation of the Randolph-Sheppard Act or of federal law was declared to have been committed by the Retirement System, which never had any administrative responsibility or authority under the Randolph-Sheppard Act. The district court simply concluded that it would only be equitable to allow those vending stand operators

who wished to withdraw their employee contributions, or who had withdrawn within the last three years, to withdraw the "employer" contributions with interest at the same rate as is paid on employee contributions. Appendix D at A-23-24. The district court rejected Petitioners' argument that the Retirement System had not been unjustly enriched and had not enjoyed a windfall. The Retirement System argued that it had received the amount of employer contributions which it was entitled to receive for coverage of the vendors as a group within the Retirement System and that it had paid out and would pay out precisely the amount of money which it was required to pay out to withdrawing members, specifically the employee contributions credited to their individual accounts in the Annuity Savings Fund. It also pointed out that it already had a projected deficiency of more than one million dollars ($1,000,000.00) as a result of participation of the entire unit of vending stand operators. Returning employer contributions to the class of Respondents could cost over $950,000.00 exclusive of interest, depending on the number of vendors choosing to withdraw. Nevertheless, the district court simply concluded that it would be inequitable to allow the Department of Human Resources improperly to withhold stand proceeds for employer contributions and pay those over to the Retirement System and then to allow the Retirement System to retain the funds. Appendix D at A-24.

The district court held that the Retirement System was not entitled to Eleventh Amendment immunity, primarily because its funds included money which did not come from state appropriations, because it is established as a body politic and corporate with authority to sue and

be sued and hold property, and because the Constitution of North Carolina protects Retirement System funds from use for other state purposes. Appendix D at A-24-27. The district court also certified a class of licensed vending stand operators required to make employer and employee contributions, who have not died or retired, and who have not been allowed to receive a refund of employer contributions. The Retirement System was required to give vending stand operators the option of receiving a refund of both employer and employee contributions, thus permitting vendors to retain their membership if they so choose, for example, if they qualify for a substantial retirement benefit. Opinion and Order of District Court, Appendix D at A-23; Judgment of District Court, Appendix E at A-32.

Both the Petitioners herein and the defendants connected with the Department of Human Resources gave timely notice of appeal from the judgment and opinion of the district court and from subsequent orders related to attorneys fees and expenses. Respondents cross-appealed the award to them of only 4% interest on the employer contributions. On June 6, 1986, the Fourth Circuit Court of Appeals affirmed the judgment of the district court except with regard to attorneys' fees, as to which it remanded. On the issues raised in this Petition, the Fourth Circuit merely rejected the claims "for the reasons stated by the district court." Appendix A at A-14. Since the Fourth Circuit did not discuss the issues raised here, the district court opinion must be looked to for the reasoning and authority, or lack thereof, on which the lower courts' decisions were based.

———o———

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for certiorari because the decision below is wholly inconsistent with the language of this Court in recent cases interpreting and explaining the Eleventh Amendment. *E.g., Green v. Mansour,* 474 U.S. —, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985); *Atascadero State Hospital v. Scanlon,* 473 U.S. —, 105 S.Ct. 342, 87 L.Ed.2d 171 (1985); *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (*Pennhurst II*); *Cory v. White,* 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982); *Florida Dept. of Health v. Florida Nursing Home Assn.,* 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (*per curiam*). Further, the decision appears to be inconsistent in principle with decisions of other circuit courts addressing the question of applicability of the Eleventh Amendment to particular entities. The Fourth Circuit does not appear to have addressed the question of the type of entity to which the Eleventh Amendment is applicable in any other published opinion since 1981. To leave this opinion standing will leave state agencies of various types within the Fourth Circuit liable for money damages and other relief under circumstances which would, based on existing case law, clearly entitle them to Eleventh Amendment protection in other circuits and under a reasonable interpretation and application of this Court's opinions.

To put the Eleventh Amendment issue in focus, it is necessary to understand the legal status of the Retirement System under North Carolina law. The Retirement System is governed by extensive and detailed statutory provisions. It is administered by a Board of Trustees,

established as "a body politic and corporate" with the right to sue and be sued, to have perpetual succession, and to acquire, hold and dispose of real and personal property. Its property is exempt from all taxes imposed by either the state or any political subdivision, including income taxes. N.C. Gen. Stat. § 135-6(a), Appendix F at A-38. Trustees are all either state officials serving ex officio or appointees of state officials. N.C. Gen. Stat. § 135-6(b), Appendix F at A-38-39. Trustees are compensated and reimbursed for expenses at the rate for members of all state boards and commissions. N.C. Gen. Stat. § 135-6(c), Appendix F at A-40. Trustees are required to take an oath of office, which is filed with the Secretary of State. N.C. Gen. Stat. § 135-6(d), Appendix F at A-40. The legal advisor to the Board of Trustees is the state Attorney General. N.C. Gen. Stat. § 135-6(j), Appendix F at A-41. While the Board of Trustees is the trustee of Retirement System funds, the State Treasurer is the custodian of those funds and is responsible for investment of assets in accordance with statutory provisions. N.C. Gen. Stat. § 135-7(a), (c), Appendix F at A-43-44. Funds held by the Retirement System must be handled and disbursed in accordance with the state's Executive Budget Act. N.C. Gen. Stat. § 135-8(f)(2)a, Appendix F at A-50. The salary of the Director is subject to the State Personnel Act, and compensation of other persons contracted with is subject to approval of the Director of the Budget. N.C. Gen. Stat. § 135-6(g), Appendix F at A-41. Board records are required to be open for public inspection under the Public Records Act. N.C. Gen. Stat. § 135-6(i), Appendix F at A-41. Pursuant to General Statutes §§ 143A-6(b), (c), and 143A-34, the Retirement

System and its Board of Trustees operate under the Department of the State Treasurer, which is responsible for "management functions" defined as "planning, organizing, staffing, directing, coordinating, reporting and budgeting." Appendix F at A-53-54.

The Retirement System is clearly an agency of the State of North Carolina. Indeed, the district court referred to it as a "state agency . . .", Appendix D at A-24. The court below considered the autonomy of the agency and whether recovery against it would come from state funds as determining the Eleventh Amendment question. It concluded that the autonomy factor did not weigh heavily for either party, balancing the numerous statutes subjecting the Retirement System to state control against the characterization of the Board of Trustees as a body politic and corporate with the right to sue and be sued, and to acquire and dispose of real and personal property. Appendix D at A-25. Yet this Court has specifically held that an entity which is a body corporate with the authority to sue and be sued may be entitled to Eleventh Amendment immunity if it is a state agency and Eleventh Amendment immunity has not been explicitly waived. *Florida Dept. of Health v. Florida Nursing Home Assn, supra.* The Retirement System has specifically been held to be an agency of the state protected by the defense of sovereign immunity in state court proceedings. *Stanley v. Retirement & Health Benefits Div.*, 66 N.C. App. 122, 310 S.E.2d 637, *app. dismissed, disc. rev. den'd*, 310 N.C. 626, 315 S.E.2d 692 (1984). While the North Carolina Supreme Court has not addressed this issue, it did deny review of *Stanley*, which relied on and followed state supreme court decisions considering the sovereign immu-

nity question for other state agencies created as bodies politic and corporate with authority to acquire and dispose of property and to sue and be sued. *See Guthrie v. Ports Authority,* 306 N.C. 522, 299 S.E.2d 618 (1983); *McDonald v. University of North Carolina,* 299 N.C. 457, 263 S.E.2d 578, *reh. denied* 300 N.C. 380 (1980).

What the court below relied upon primarily was its conclusion that payment of funds from the Retirement System would not inevitably come from the general state revenues of the State of North Carolina. Specifically, it pointed out that Retirement Systems funds include employee contributions, payments by non-state employers and investment earnings. (It should be noted that almost all employers are either state entities or local governmental educational institutions supported largely by state appropriations.) Secondly, the state has insulated retirement funds from other state money and prohibited their use for other purposes. Const. of N.C., Art. V, § 6, Appendix F at A-35. Thirdly, the court below believed that money other than general state revenues was available to the Retirement System in that it has investment income or, according to the court, the option of decreasing benefits paid to other beneficiaries. Appendix D at A-27. This conclusion ignores the system-wide funding approach and the aggregation of funds held by the Retirement System. It is impossible to isolate particular funds for payments to the class of vending stand operators or to make payment without an impact on the employer contribution rate, either by requiring an increase in future rates or by not being able to effect a decrease which would otherwise be possible. Nor can the Retirement System decrease benefits without either violating state law or obtaining a legis-

lative change, raising constitutional questions regarding the decrease of benefits to existing members.

The Court below failed to consider recent Eleventh Amendment case law, but relied instead on an artificial concept of Eleventh Amendment immunity based on some determination as to whether, in a particular case, money damages *must* be paid from general revenues of the State. This construction was based on a phrase from this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), and on a 1979 decision of the Third Circuit Court of Appeals. That case also involved a public employee retirement system, but one as to which there were many distinguishable features not addressed below. *See Blake v. Kline,* 612 F.2d 718 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980).

This Court has clearly stated that the Eleventh Amendment is not limited to cases involving payment of money judgments. *E.g., Cory v. White, supra; see also Green v. Mansour, supra.* It does not make sense on the one hand to say that the Eleventh Amendment bars an action for injunctive relief where no public funds are sought, but on the other hand to hold, as the court below did, that the Eleventh Amendment does not bar a monetary award against a state agency if only the money can hypothetically be paid from something other than general state revenues. Attempting to reconcile the theory of the court below with cases such as *Cory v. White* leads to nonsensical results. One could conclude that a state agency whose funds are entirely derived from general state revenues is shielded from all relief, except for prospective injunctive relief from violation of federal law or the Constitution of

the United States, while a state agency with substantial funds other than general state revenues is liable even for non-monetary and other kinds of relief despite the lack of relevance of the source of funds to non-monetary relief. Perhaps instead a state agency such as the Retirement System is liable only for monetary relief or if financial calculations show the damages will not exceed the money available outside of general state revenues. Surely the Eleventh Amendment is not to be applied so arbitrarily.

The Eleventh Amendment functions as an embodiment of the principle of sovereign immunity limiting the jurisdiction of the federal courts. *Green v. Mansour*, 474 U.S. at —, 106 S.Ct. at 425-26, 88 L.Ed.2d at 377; *Atascadero State Hospital v. Scanlon*, 473 U.S. at —, 105 S.Ct. at 3145, 87 L.Ed.2d at 177; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 98, 104 S.Ct. at 906, 79 L.Ed.2d at 77. To hold the Retirement System liable to respondents herein is totally to ignore both the concept that a state's sovereign immunity is recognized in the Eleventh Amendment and the language of this Court in *Pennhurst*:

> The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.' *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted).

Pennhurst State School and Hospital v. Halderman, 465 U.S. at 101, 104 S.Ct. at 908, 79 L.Ed.2d at 79, n. 11. Requiring the Retirement System to pay employer contribu-

tions to the Respondents herein would certainly compel the government of North Carolina to act in the form of its Retirement System and its State Treasurer and would certainly interfere with the public administration as provided by its legislature in a comprehensive retirement plan for state employees and employees of educational systems funded largely by state money. Also, it would clearly expend itself on the state treasury since money paid into the Treasurer under state laws becomes part of the state treasury subject to constitutional provisions limiting payment of money from the state treasury. *See State v. Davis*, 270 N.C. 1, 153 S.E.2d 749, *cert. denied*, 389 U.S. 828 (1967); *Gardner v. Retirement System*, 226 N.C. 465, 38 S.E.2d 314 (1946).

In light of recent decisions of this Court, other circuit courts of appeals have approached the issue of when an agency or associated entity is entitled to Eleventh Amendment immunity very differently from the approach taken below. For example, the Fifth Circuit considers such factors as source of funds and autonomy of the agency in determining whether a particular agency is entitled to Eleventh Amendment immunity, but only as a means of reaching its ultimate conclusion whether the agency is, under state statutes and case law, considered an arm of the state. Thus, in *Clark v. Tarrant County, Texas*, the Eleventh Amendment was held to bar recovery from a county adult probation department because a portion of its funding came from the state, probation departments were established by judicial districts under the supervision of district judges, and substantial state supervision and regulation were involved. 798 F.2d 736 (5th Cir. 1986). The Louisiana Department of Wildlife and Fisheries and the

Louisiana Wildlife and Fisheries Commission were held protected by Eleventh Amendment immunity even though monies collected by them were deposited into special funds in the state treasury and even though both the department and commission were authorized to sue in their own names, with the department also authorized to hold, acquire, and use property. The court reasoned that other factors, such as statutory and constitutional restrictions on the way in which money was paid out and the organizational structure of the department within the state government, clearly indicated that both the agencies were alter egos of the state. *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183 (5th Cir. 1986). The Fifth Circuit has even held that a state bar association is entitled to Eleventh Amendment immunity on the theory that it serves as an agent of the state Supreme Court, because its rules must be approved by the Supreme Court and its dues are license taxes under state law. *Lewis v. Louisiana State Bar Assn.*, 792 F.2d 493 (5th Cir. 1986). Thus, in the Fifth Circuit, an entity such as the Retirement System would be viewed more realistically with recognition that its funds are deposited into the state treasury under the custody and control of the State Treasurer, that the funds are state money subject to restrictions through substantive legislation, appropriations acts, and state budgeting provisions, and that the public policy and funding of the state are necessarily involved in any expenditure contrary to the system established by state law.

The Fifth Circuit is by no means the only court of appeals which has decided Eleventh Amendment issues according to the ultimate conclusion of whether an entity is an alter ego or arm of the state. For example, the Sixth

Circuit recognized that the availability of substantial revenues from other sources did not preclude Eleventh Amendment immunity where the amount of revenues appropriated by the state legislature fluctuated in response to the size of revenues received from other sources. *Hall v. Medical College at Toledo,* 742 F.2d 499 (6th Cir. 1984). Similarly, in this case, the consulting actuary to the Retirement System filed an affidavit indicating that, because of the annual actuarial valuation on which recommendations for the employer contribution rate are based, the rate would be affected by any refund of employer contributions. Thus, the direct and indirect appropriations to state agencies and public educational institutions for purposes of salary payments, with accompanying fringe benefits including employer contributions to the Retirement System, will fluctuate with the expenditures of the Retirement System, including any award payable as a result of this case.

The Eleventh Circuit has also recognized, in slightly different terminology, that the ultimate question in determining Eleventh Amendment immunity is the nature of the entity under state law. That court held the Florida Unemployment Appeals Commission to be entitled to Eleventh Amendment immunity despite the substantial federal funds which it receives and despite the fact that the state has limited liability for unemployment benefits. The court there considered the fact that the commission was a creature of statute operating within the executive branch of the state government, that administrative and fiscal control were exercised through the State Bureau of Employment Security and expenditure restrictions, and that all monies received were paid into the state treasury. *Fincher v. State of Florida, Department of Labor and Em-*

ployment Security--Unemployment Appeals Comm., 798 F.2d 1371 (11th Cir. 1986) (*per curiam*). Similarly, the Eleventh Circuit also determined Georgia's Jekyll Island-State Park Authority to be entitled to Eleventh Amendment immunity. Even though the Park Authority is a public corporation with authority to raise money through issuance of bonds and from operation of the park itself, it is nevertheless a state agency subject to budgetary control by the state and its legislature, subject to extensive control by the state administratively, and considered to be operated for a public purpose. In that case the court rejected the argument that non-state funds could be used to pay any judgment and thus remove the case from the Eleventh Amendment's scope even though the record indicated that, in at least one recent two-year period, the Park Authority was self-supporting. Since its budget was submitted to the Georgia General Assembly, the court assumed that the state would be responsible for debts which could not be paid out of Park Authority revenues. *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518 (11th Cir. 1983).

Other cases from other circuits could also be cited to show a different approach and different results on the question of Eleventh Amendment immunity from the approach and results below. For example, the Seventh Circuit has indicated that its approach to Eleventh Amendment issues and the significance of the question whether a judgment would affect the state treasury has been influenced by recent decisions of this Court, particularly *Pennhurst, supra*. *See Jensen v. State Bd. of Tax Comm.*, 763 F.2d 272, 277 (7th Cir. 1985). However, an exhaustive analysis of all recent Eleventh Amendment decisions is not

necessary to illustrate Petitioners' contention that the Fourth Circuit, in affirming the district court on the basis of the reasons set out in the district court opinion, is simply out of step with the other circuit courts of appeals as well as with this Court.

The result below is particularly problematical since the only ground for Retirement System liability mentioned by the district court was apparently based on general equitable principles of restitution. See Opinion and Order of the District Court, Appendix D at A-24. Under *Cory v. White, supra,* the Eleventh Amendment bars equitable relief against the state even though no payment of money from state funds is involved and even though the court there otherwise had jurisdiction under federal law. Under *Pennhurst, supra,* the Eleventh Amendment bars any pendent claim against a state official based on state law regardless of whether liability could be established under state law. Under *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), the Eleventh Amendment bars federal courts from asserting jurisdiction over an ancillary claim against a state, whether that claim is based on state law or federal common law. These cases indicate that the Eleventh Amendment barrier is stronger in cases of pendent or ancillary jurisdiction or in cases involving general equitable relief than it is in cases involving a determination that the state entity against whom liability is sought has violated federal constitutional or statutory law. How then can an agency be held liable solely on a theory of pendent equitable jurisdiction when it has not been determined to have violated federal statutory or constitutional law simply because it has resources other than general state revenues?

The court below compounded its error on the Eleventh Amendment issue by erroneously concluding simply that it would be unequitable for the vendors not to recover the employer contributions and therefore it would be unequitable for the Retirement System to keep them. Appendix D at A-24. The same hornbook authority on which the district court based its equitable conclusion describes the principle underlying resitutionary recovery as "the avoidance of unjust enrichment on the part of the defendant." D. Dobbs, *Handbook on the Law of Remedies*, § 4.1 at 224 (1978). Thus, it should not have been simply the loss to the vendors, but also the existence of gain to the Retirement System which determined whether restitution was appropriate. The uncontradicted affidavits filed by the Retirement System explained that its funding is based on the assumption that all employer contributions will remain in the Retirement System. If employer contributions are not all retained, the amount of future contributions necessary to fund present and future benefits will be greater. The parties were not put back in *status quo* as if no vending stand operators had ever been members of the Retirement System. Instead, as requested by Respondents, vendors have the option of withdrawing employer contributions as well as employee contributions if they so choose or of remaining in the Retirement System and receiving benefits if they so choose. Those who profit from the Retirement System may do so while those who feel they do not profit may withdraw and receive back everything paid in on their behalf. Yet, the Retirement System's funding is based on the premise that many persons will withdraw their employee contributions, making their employer contributions available for funding benefits without any ac-

companying liability, while other persons will retire and receive benefits much greater than contributions paid in on their behalf could fund. The court below thus erroneously denied Eleventh Amendment immunity to the Retirement System and then held the Retirement System liable in equity even though it did not commit any wrong against Respondents and even though it has not been unjustly enriched or enjoyed any windfall as a result of membership of the vending stand operators.

CONCLUSION

It is therefore respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

LACY H. THORNBURG
ATTORNEY GENERAL OF
NORTH CAROLINA

REGINALD L. WATKINS
Special Deputy Attorney General

NORMA S. HARRELL
Assistant Attorney General
Counsel of Record

Attorneys for Petitioners
N. C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 733-6026

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1830

Robert P. Almond; Jerry A. Calloway; Vernon G. Cox; Allen E. Dail; Janice D. Decker; David W. Guthrie; Brenda M. Herring; Sherman L. Lewis; Janice E. Osborne; Leslie T. Simmons, on behalf of themselves and all other persons similarly situated,

Appellees,

versus

Harlan E. Boyles, in his official capacity as Treasurer of the State of North Carolina and as Chairman of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; R. Eugene Ballard, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Ezra A. Bridges, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; M. L. Byrd, in his or her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; William C. Covington, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees Retirement System; Withers Davis, in his official capacity as a member of the Board of Trustees of the

North Carolina Teachers' and State Employees' Retirement System; Colleen Jakes, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Horace Jernigan, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Dan W. Jones, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; V. Glenn Morton, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Thomas Z. Osborne, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; A. Craig Phillips, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Theo H. Pitt, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Linda I. Rader, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; E. T. Barnes, in his official capacity as Deputy Treasurer of the State of North Carolina and as Director of the Retirement Systems Division,

Defendants,

and

Phillip J. Kirk, in his official capacity as Secretary, North Carolina Department of Human Resources; Herman Gruber, in his official ca-

pacity as Director, Division of Services for the Blind, North Carolina Department of Human Resources; Mary Ann Van Name, in her official capacity as Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources,

Appellants.

No. 85-1831

Robert P. Almond; Jerry A. Calloway; Vernon G. Cox; Allen E. Dail; Janice D. Decker; David W. Guthrie; Brenda M. Herring; Sherman L. Lewis; Janice E. Osborne; Leslie T. Simmons, on behalf of themselves and all other persons similarly situated,

Appellees,

versus

Harlan E. Boyles, in his official capacity as Treasurer of the State of North Carolina and as Chairman of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; R. Eugene Ballard, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Ezra A. Bridges, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; M. L. Byrd, in his or her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; William C. Covington, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina

Teachers' and State Employees Retirement System; Withers Davis, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Colleen Jakes, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Horace Jernigan, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Dan W. Jones, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; V. Glenn Morton, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; A. Craig Phillips, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Theo H. Pitt, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Linda I. Rader, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; E. T. Barnes, in his official capacity as Deputy Treasurer of the State of North Carolina and as Director of the Retirement Systems Division,

Appellants,

and

Thomas Z. Osborne, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Board of Trustees of the North Carolina Teachers' and State Employ-

ees' Retirement System; A. Craig Phillips, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Phillip J. Kirk, in his official capacity as Secretary, North Carolina Department of Human Resources; Herman Gruber, in his official capacity as Director, Division of Services for the Blind, North Carolina Department of Human Resources; Mary Ann Van Name, in her official capacity as Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources,

Defendants.

No. 85-1832

Robert P. Almond; Jerry A. Calloway; Vernon G. Cox; Allen E. Dail; Janice D. Decker; David W. Guthrie; Brenda M. Herring; Sherman L. Lewis, on behalf of themselves and all other persons similarly situated,

Appellants,

and

Janice E. Osborne; Leslie T. Simmons,

Plaintiffs,

versus

Harlan E. Boyles, in his official capacity as Treasurer of the State of North Carolina and as Chairman of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; R. Eugene Ballard, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;

Ezra A. Bridges, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; M. L. Byrd, in his or her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; William C. Covington, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees Retirement System; Withers Davis, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Colleen Jakes, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Horace Jernigan, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Dan W. Jones, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; V. Glenn Morton, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; A. Craig Phillips, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Theo H. Pitt, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Linda I. Rader, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; E. T. Barnes, in his official capacity as Deputy Treasurer of the State of North Carolina and as Director of the Retirement Systems Division,

Phillip J. Kirk, in his official capacity as Secretary, North Carolina Department of Human Resources; Herman Gruber, in his official capacity as Director, Division of Services for the Blind, North Carolina Department of Human Resources; Mary Ann Van Name, in her official capacity as Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources,

Appellees.

and

Thomas Z. Osborne, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;

Defendants.

No. 85-2019

Robert P. Almond; Jerry A. Calloway; Vernon G. Cox; Allen E. Dail; Janice D. Decker; David W. Guthrie; Brenda M. Herring; Sherman L. Lewis; Janice E. Osborne; Leslie T. Simmons, on behalf of themselves and all other persons similarly situated,

Appellees,

versus

Harlan E. Boyles, in his official capacity as Treasurer of the State of North Carolina and as Chairman of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; R. Eugene Ballard, in his official capacity as a member of the Board

of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Ezra A. Bridges, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; M. L. Byrd, in his or her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; William C. Covington, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees Retirement System; Withers Davis, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Colleen Jakes, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Horace Jernigan, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Dan W. Jones, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; V. Glenn Morton, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; A. Craig Phillips, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Theo H. Pitt, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Linda I. Rader, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; E. T. Barnes, in his official capacity as Deputy

Treasurer of the State of North Carolina and as Director of the Retirement Systems Division, Phillip J. Kirk, in his official capacity as Secretary, North Carolina Department of Human Resources; Herman Gruber, in his official capacity as Director, Division of Services for the Blind, North Carolina Department of Human Resources; Mary Ann Van Name, in her official capacity as Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources,

Appellants,

and

Thomas Z. Osborne, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;

Defendants.

No. 85-2074

Robert P. Almond; Jerry A. Calloway; Vernon G. Cox; Allen E. Dail; Janice D. Decker; David W. Guthrie; Brenda M. Herring; Sherman L. Lewis, on behalf of themselves and all other persons similarly situated,

Appellants,

and

Janice E. Osborne; Leslie T. Simmons,

Plaintiffs,

versus

Harlan E. Boyles, in his official capacity as Treasurer of the State of North Carolina and

as Chairman of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; R. Eugene Ballard, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Ezra A. Bridges, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; M. L. Byrd, in his or her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; William C. Covington, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees Retirement System; Withers Davis, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Colleen Jakes, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Horace Jernigan, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Dan W. Jones, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; V. Glenn Morton, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; A. Craig Phillips, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Theo H. Pitt, Jr., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Linda I. Rader, in her official capacity as a member

of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; E. T. Barnes, in his official capacity as Deputy Treasurer of the State of North Carolina and as Director of the Retirement Systems Division, Phillip J. Kirk, in his official capacity as Secretary, North Carolina Department of Human Resources; Herman Gruber, in his official capacity as Director, Division of Services for the Blind, North Carolina Department of Human Resources; Mary Ann Van Name, in her official capacity as Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources,

Appellees,

and

Thomas Z. Osborne, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System; Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;

Defendants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Chief District Judge. (C/A 84-138)

Argued: April 8, 1986 Decided: June 6, 1986

Before HALL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Norma S. Harrell, Lead Counsel, and Doris J. Holton, Assistant Attorney General (Lacy H. Thornburg, Attorney

General; Wilson Hayman, Assistant Attorney General on brief) for Appellants/cross-appellees; Steven J. Levitas (Robert W. Spearman; John J. Butler; Sanford, Adams, McCullough & Beard; Charles R. Hassell, Jr. on brief) for Appellees/cross-appellants.

HALL, Circuit Judge:

Officials of the North Carolina Department of Human Resources ("DHR") and the North Carolina Teachers' and State Employees' Retirement System (the "Retirement System") appeal from the district court's order granting summary judgment and awarding attorneys' fees to plaintiffs. Plaintiffs cross-appeal, contesting the interest component of the judgment. We affirm in part, vacate in part, and remand for a redetermination of attorneys' fees.

Plaintiffs, visually handicapped persons who operate vending stands in North Carolina, brought this class action, pursuant to the Randolph-Sheppard Act (the "Act"), 20 U.S.C. §§ 107 *et seq.*, to recover monies diverted from them as employer contributions to the Retirement System. The district court ruled that DHR violated plaintiffs' rights under the Act when it deducted employer contributions to the Retirement System from vending stand proceeds. It held that plaintiffs are entitled to recover those contributions from the Retirement System with interest at the rate of four percent. The district court ruled, however, that recovery would be barred by the three-year statute of limitations in the case of vendors who withdrew from the Retirement System more than three years before commencement of the action, and that recovery should be reduced by the amount of any dis-

ability retirement, disability salary continuation, or death benefits received by individual plaintiffs. Additionally, the court awarded plaintiffs attorneys' fees and costs.

In calculating the amount of attorneys' fees, the district court first determined lodestar figures for plaintiffs' counsel, Sanford, Adams, McCullough & Beard ("SAMB"), and Charles R. Hassell, by multiplying reasonable hourly rates by reasonable hours expended. It then made upward adjustments to those figures through application of factors listed in this Court's decision in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) (adopting the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). The court increased both figures ten percent due to the complexity and novelty of the case, another ten percent due to the case's contingent nature, and an additional five percent in view of the results obtained. The district court further enhanced the lodestar amount for SAMB by an additional ten percent because of the reputation, ability, and experience of counsel.

On appeal, DHR and the Retirement System raise a number of contentions: (1) that the district court erred in ruling that the eleventh amendment does not bar recovery from the Retirement System; (2) that the district court erred in holding that the DHR defendants violated the Act; (3) that the district court erred in ruling the Retirement System liable in equity to plaintiffs; (4) that the district court abused its discretion in the award of attorneys' fees to plaintiffs' counsel; (5) that the district court erred in holding that the statute of limitations does not bar recovery of employer contributions made more

than three years before the action was filed; and (6) that the district court erred in failing to hold that recovery was barred for vendors who left their employment before the limitation period but who did not withdraw their employee contributions to the program. In their cross-appeal, plaintiffs allege that the district court erred by awarding them only four percent interest rather than investment income at fair market rates on the funds diverted from them to the Retirement System as employer contributions.

With the exception of the attorneys' fees issue, we reject as meritless appellants' contentions one through five for the reasons stated by the district court. *Almond v. Boyles,* 612 F.Supp. 223 (E.D. N.C. 1985). We find no merit in their sixth allegation. Likewise, we determine that plaintiffs' cross-appeal must fail, as the district court did not abuse its discretion in awarding plaintiffs only four percent interest. Therefore, the judgment below is affirmed as to these issues.

With respect to the award of attorneys' fees, we conclude that the district court applied the wrong standard in calculating the award. As we recently noted in *Daly v. Hill,* — F.2d —, No. 84-1715, slip op. 15-16 (4th Cir. April 21, 1986), the latest Supreme Court decisions on this matter, *Blum v. Stenson,* — U.S. —, 104 S.Ct. 1541 (1984), and *Hensley v. Eckerhart,* 461 U.S. 424 (1983), make clear that "[a] fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall." Under *Blum* and *Hensley,* upward adjustments of the lodestar amount based on the other factors listed in *Barber* are not favored and are appropriate only where

exceptional circumstances are present. Moreover, many of these additional factors are normally subsumed in initially determining the lodestar figure. *Blum,* 104 S.Ct. at 1548-49, *Hensley,* 461 U.S. at 434 n. 9.*

In the instant case, the district court calculated lodestar figures for plaintiffs' counsel and then increased the two lodestar amounts thirty-five percent and twenty-five percent, respectively, based on its application of various *Barber* factors. We find nothing in the record to indicate that the district court identified any exceptional circumstances which warrant such increases. We conclude, therefore, that under *Blum* and *Hensley,* this enhancement of the lodestar figures was improper. Accordingly, we vacate and remand to the district court for a redetermination of appropriate attorneys' fees in light of *Blum* and *Hensley* and our decision in *Daly.*

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

---

*The complexity or novelty of the case, the quality of representation, and the results obtained are *Barber* factors which are generally subsumed within the factors used to calculate a reasonable fee and do not normally provide an independent basis for increasing the fee award. *Blum,* 104 S.Ct. at 1548-49.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1830
85-1831
85-1832
85-2019
85-2074

Robert P. Almond, et al,

Appellees,

versus

Harlan E. Boyles, etc., et al,

Defendants,

and

Phillip J. Kirk, etc., et al,

Appellants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge

---

(Filed Oct. 3, 1986)

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Chapman and Judge Butzner.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 85-1830
85-1831
85-1832
85-2019
85-2074

Robert P. Almond, et al,

Appellees,

versus

Harlan E. Boyles, etc., et al,

Defendants,

and

Philip J. Kirk, etc., et al,

Appellants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge

---

(Filed Oct. 29, 1986)

Upon consideration of appellants' motion for stay of mandate,

IT IS ORDERED that the mandate is hereby recalled and stayed pending timely application to the United States Supreme Court for a writ of certiorari.

Entered at the direction of Judge Hall with the concurrence of Judge Chapman and Judge Butzner.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

ROBERT P. ALMOND, et al.,

Plaintiffs,

v.

HARLAN E. BOYLES, et al.,

Defendants.

No. 84-138-CIV-5

MEMORANDUM OPINION AND ORDER
(Filed June 25, 1985)

This action is brought pursuant to the Randolph-Sheppard Act (Act) by visually handicapped persons who operate vending stands in North Carolina. *See* 20 U.S.C. §§ 107-107(f). They filed the action on 17 February 1984 against officials of the North Carolina Department of Human Resources (DHR) and the North Carolina Teachers' and State Employees' Retirement System (Retirement System). Plaintiffs allege that the defendants have violated their constitutional and statutory rights by unlawfully deducting the "employer" contributions to the Retirement System from vending stand proceeds, and by refusing to return the "employer" contributions to the plaintiffs in 1983 when they were given the option to withdraw from the Retirement System. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and all similarly situated Randolph-Sheppard vendors to recover all monies that they were forced to contribute to the System. The matter is before the court on the plaintiffs' motions for summary judgment and class certification and the defendants' motions to dismiss and for summary judgment.

The Randolph-Sheppard Act was enacted in 1936 to provide business opportunities for the visually handicapped. Since 1955 DHR and its predecessor agencies have administered the Randolph-Sheppard vending stand program in North Carolina. This program has been funded primarily by the federal government. Pursuant to the Vocational Rehabilitation Act, the federal government matches at a rate of 4 to 1 non-federal funding for purposes of vocational rehabilitation. *See* 29 U.S.C. §§ 701 *et seq.* The non-federal share of the vending program budget has come primarily from vending stands proceeds. In applying for designation as a Randolph-Sheppard licensing agency, and in exchange for the federal grants it received to operate the program, DHR agreed to administer the program in accordance with the Randolph-Sheppard Act and regulations promulgated thereunder.

Prior to 1974 the Randolph-Sheppard Act provided that deductions from the "proceeds" of vending facilities could be "set aside" for only four purposes:

1. Maintenance and replacement of equipment;
2. The purchase of new equipment;
3. Management services; and
4. Assuring a fair minimum return to operators of vending stands.

The Act further provided that "in no event shall the amount of such funds to be aside from the proceeds of a vending stand exceed a reasonable amount which shall be determined by the Secretary." *See* 20 U.S.C. § 107(b)(3). In 1974 Congress amended the Act to provide that vending stand proceeds could be set aside for the purchase of retirement benefits and other fringe benefits for the ven-

dors, but only after full disclosure and a majority vote by the vendors. The 1974 amendments further provided that deductions for any of the five purposes allowed by the Act were to be made from the vending stands' ***net*** proceeds, rather than the *gross* proceeds. *Id.*

The Act's language and legislative history indicate that Congress intended for the Randolph-Sheppard vendors to be treated as self-employed independent contractors. Nevertheless, in North Carolina DHR has in many ways treated the vendors like they were state employees. Since 1971 DHR has collected the vending stands' gross proceeds, made deductions therefrom, and then distributed the balance to the vendors. Prior to 1971, however, vending stand operators were paid a weekly salary and bonuses. DHR kept the surplus proceeds in a special reserve account. As a result, DHR accumulated $300,000 in reserves from vending stand proceeds. These funds were transferred to the state's general fund in 1971. At that time the North Carolina General Assembly decided to examine the retirement benefits available to the vendors. The vendors had set up a private retirement program, though it was clearly inadequate to meet their needs. The General Assembly hired an actuarial firm to conduct a study to examine the vendors' retirement program and determine the best way to provide the vendors with adequate retirement benefits. The actuarial firm concluded that the vendors should be brought into the North Carolina Teachers' and State Employees' Retirement System. Thus, all Randolph-Sheppard vendors in North Carolina became members of the state Retirement System. The vendors' private retirement plan assets of $163,490.09 and an additional one-time state appropriation of $145,000 were transferred to the Retirement System.

The Retirement System provides benefits for the employees of state agencies and the employees of several non-state entities, such as county and city school boards. Under state law, funding for the Retirement System is divided into two parts, the "employer" contribution (9.12%) and the "employee" contribution (6%). The "employer" contribution is paid by the state agency employer or non-state employer. In the case of Randolph-Sheppard vendors, however, both the "employer" and "employee" contributions were deducted from vending stand proceeds.

In 1983 the General Assembly finally came to realize that Randolph-Sheppard vendors were properly classified as self-employed individuals rather than state employees. On 30 September 1983 the General Assembly passed an act which provided that Randolph-Sheppard vendors licensed in the future would not be allowed to participate in the Retirement System. Furthermore, all licensed vendors who had been participating in the Retirement System were required to make an irrevocable election to: (1) Continue contributing both the "employer" and "employee" shares to the Retirement System; or (2) cease contributing to the System *and* (a) receive a refund of "employee" contributions plus statutory interest; (b) apply for and commence receiving a monthly retirement allowance; or (c) leave accumulated contributions in the System and retain the right to receive an actuarially reduced pension at some future date. The vendors were not given the option to withdraw both the "employer" and "employee" contributions from the System.

On 17 February 1984 plaintiffs filed this action on behalf of themselves and all similarly-situated Randolph-Sheppard vendors, seeking both declaratory and injunctive

relief. In effect, plaintiffs want the Retirement System to give them the option to withdraw from the Retirement System and receive a refund of all the money they were required to contribute to the System. This court finds that the plaintiffs were wrongfully required to pay both the "employer" and "employee" contributions to the Retirement System and are entitled to the relief requested.

RANDOLPH-SHEPPARD ACT VIOLATION

There was clearly a violation of the Randolph-Sheppard Act in this case. Prior to 1974 the establishment of retirement or fringe benefit programs was not one of the four purposes for which vending stand proceeds could be set aside. *See* 20 U.S.C. § 107(b)(3). In 1974 Congress added a fifth purpose, retirement or fringe benefit programs, for which state licensing agencies could set aside vending stand proceeds. After the 1974 amendments, state licensing agencies could set aside vending stand proceeds for retirement benefits, but only "after a majority vote of blind licensees licensed by such State agency." *Id.* DHR never gave the vendors an opportunity to vote on whether they wanted to join the Retirement System. This court does not doubt the General Assembly's good faith in attempting to provide for the vendors' retirement needs. Nor does this court doubt DHR's contention that many vendors were happy to be included in the state's Retirement System. Nevertheless, because of the fiduciary duty which DHR owes to the vendors, the Randolph-Sheppard Act requires a majority vote by the vendors before vending stand proceeds can be set aside for retirement benefits. The only equitable solution at this point is to give the vendors the option to withdraw from the Retirement Sys-

tem and receive a refund of their "employer" and "employee" contributions to the Retirement System plus statutory interest.

There is no merit to the Retirement System's argument that it cannot be compelled to refund the vendors' "employer" contributions because the Retirement System played no part in wrongfully diverting the vendors' money. It would be ridiculous to suggest that one state agency can take a person's property, give it to another state agency, and thereby prevent the wronged person from recovering his property. The principle of equitable restitution is to "deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance . . . ." D. Dobbs, Handbook on the Law of Remedies, § 4.1 at 224 (1978).

ELEVENTH AMENDMENT IMMUNITY

The eleventh amendment does not permit private parties to obtain retrospective monetary relief which "must inevitably come from the general revenues" of a state. *See Edleman v. Jordan,* 415 U.S. 651 (1974). Describing the requested relief as "equitable restitution" does not avoid the eleventh amendment barrier. Thus, the critical question in this lawsuit is whether requiring the Retirement System to refund the vendors' "employer" contributions would in effect be the same as a retroactive award of monetary damages against the state. Although state decisions and legislation dealing with the character and status of state agencies will influence federal courts, the question of eleventh amendment immunity is ultimately one of federal law. *See* 13 C. Wright, A. Miller & F.

Cooper, Federal Practice and Procedure, § 3524 at 137-38, and n.32 (1984) (hereinafter referred to as Federal Practice and Procedure). The North Carolina Court of Appeals recently opined that an award of monetary damages against the Retirement System would be barred by the eleventh amendment. *See Stanley v. Retirement and Health Benefits Division,* 66 N.C.App. 122, 310 S.E.2d 637 (1984). On the facts of this case, this court respectfully disagrees.

The two most important factors in analyzing the eleventh amendment question are (1) the degree of autonomy given to the agency and (2) whether recovery against it would come from state funds. *See* 13 Federal Practice and Procedure at 135-36. The "autonomy" factor does not weigh heavily in favor of either party in this case. The defendants emphasize the control which the state exercises over the Retirement System through the detailed statutory provisions governing the Retirement System, appointment of members of the board of trustees, performance of numerous management and administrative functions by the treasurer's department, and subjection of the Retirement System to numerous laws governing state agencies and their employees. On the other hand, the plaintiffs emphasize that the Retirement System is vested with the "power and privileges of a corporation," it is administered by a board of trustees which has the right to sue and be sued and to acquire and dispose of real and personal property, and all property acquired is held in the corporate name.

Since the "autonomy" factor is not decisive, the critical factor becomes whether recovery against the Retirement System would come from the state's general

revenue funds. This factor weighs in favor of the plaintiffs. The case which may be most instructive on this question is *Blake v. Kline,* 612 F.2d 718 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980). In *Blake* the district court dismissed the action prior to discovery and held that the Public School Employees' Retirement Board (PSERB) was an "alter-ego" of the state and enjoyed sovereign immunity. The court relied on a state court case that had held that a related agency, the State Employees' Retirement Board, was an "alter-ego" of the state. The district court found that PSERB was also an "alter-ego" of the state because it was exempted from both municipal and state taxation, and that the payment of benefits was expressly made an obligation of the state. The Third Circuit reversed and remanded, holding that the district court had relied too heavily on the state court's decision and the vague statutory language. Of particular interest in the *Blake* opinion is the Third Circuit's emphasis that for eleventh amendment purposes, the "nature" of the state's obligation to contribute to an award of monetary damages may be more important that the size of the contribution. *See Blake v. Kline,* 612 F.2d at 723.

There are three reasons why this court believes that an award of monetary relief in this case would not infringe upon the state's "general revenue funds." First, a substantial portion of the money held by the Retirement System was not appropriated by the General Assembly. Contributors to the Retirement System include state employees, non-state employers, the employees of these non-state entities, and investment income. Second, state funds appropriated to the Retirement System lose their identity as "general revenue funds" and become earmarked for a

particular purpose. At the 4 April 1985 hearing, defense counsel argued that the state should not be "punished" for ensuring that Retirement System funds were not used for any other purpose. While the state's efforts to ensure the financial integrity of the Retirement System are laudable, the law is clear that the isolation of Retirement System funds from the state's general revenues weighs heavily against the Retirement System's eleventh amendment argument. *See Blake v. Kline*, 612 F.2d at 724.

Third, and most importantly, the defendants have not shown the court that the relief requested by the plaintiffs would inevitably lead to an additional appropriation of state funds. The facts of this case are very different from the facts in *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975), *rev'd on other grounds*, 427 U.S. 445 (1976). In *Fitzpatrick*, the state was required to appropriate funds to the Connecticut State Employees' Retirement Commission annually on an actuarial basis such that at least 75% of the total retirement income payment for each year had to be made by the state. The court found that "[a] judgment against the fund would thus automatically increase the obligations of the general state treasury and amount to a judgment against the state." *See Fitzpatrick v. Bitzer*, 519 F.2d at 565. In this case, although the State of North Carolina has not expressly immunized itself from the Retirement System's general or specific liabilities, the defendants have put forth no evidence to rebut plaintiffs' contention that the requested relief may be satisfied by investment income or a slight decrease in the amount of benefits paid to other beneficiaries of the Retirement System. Therefore, the relief requested by the plaintiffs is not barred by the eleventh amendment.

STATUTE OF LIMITATIONS

North Carolina's three-year statute of limitations for liabilities created by a statute applies to this action. *See* N.C. Gen. Stat. § 1-52(2). Therefore, the claims of vendors who withdrew from the Retirement System more than three years before this action was commenced are time-barred. In addition, the defendants argue that the statute of limitations limits plaintiffs' recovery to those contributions paid in within three years of the date this action was filed. This court disagrees. The defendants' deduction of "employer" contributions was a continuing wrong for which the statute of limitations did not begin to run until the defendants stopped making the deductions in 1983. *See Taylor v. Meirick,* 712 F.2d 1112, 1118-19 (7th Cir. 1983). Noting that statutes of limitations serve a dual purpose of precluding claims brought on stale evidence and providing repose, the Seventh Circuit explained that "the defendant's uncertainty as to whether he will be sued at all will be confined to the statutory period. His uncertainty about the extent of his liability may be greater, but that is often true in litigation." *Id.* at 1119. The "continuing wrong" doctrine is especially appropriate in cases such as this one where there is a "special relationship between the plaintiff and defendant which offers the possibility of correction of the injury." *See Lewis v. Local No. 100 of the Laborers' International Union of North America,* 750 F.2d 1368, 1379 (7th Cir. 1984). Thus, plaintiffs' recovery is not limited to those contributions paid in within three years of the date this action was filed.

EXTENT OF RELIEF

Plaintiffs' recovery should be reduced by the amount of benefits they have actually received from the Retirement System in the form of disability retirement, disability salary continuation, or death benefits. The defendants argue that plaintiffs' recovery should also be reduced by the value of

> [T]he protection of disability retirement provisions for those employees with more than five years, the protection of disability salary continuation provisions for those employees with more than one year, the protection of the death benefit for those employees with more than one year membership service, and the right to participate in the group health insurance plan for teachers and state employees at a favorable rate and benefit level.

In addition to the fact that these benefits are not readily quantifiable, courts have held in analogous situations that the intangible value of lost "protection" is not recoverable. *See Spagnuolo v. Whirlpool Corp.*, 550 F.Supp. 432, 433 (W.D.N.C. 1982), *rev'd on other grounds*, 717 F.2d 114 (4th Cir. 1983). Therefore, plaintiffs' recovery shall not be reduced by the value of the "protection" provided by the Retirement System.

CLASS CERTIFICATION

This court finds that the requirements for maintaining a class action set forth in Rule 23(a) and 23(b)(2) have been met in this case. The relief sought by plaintiffs is injunctive in nature, and the defendants' liability is rooted in grounds applicable to all members of the class. *See Brown v. Porcher*, 502 F.Supp. 946 (D.S.C. 1980),

aff'd 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, — U.S. —, 103 S.C. 796 (1983). Thus, plaintiffs' motion for class certification is allowed. The class shall consist of

> all persons licensed at any time since 1 July 1971 as vending stand operators under the North Carolina Randolph-Sheppard Program, except those who have retired or died, who have been forced to make both 'employer' and 'employee' contributions to the North Carolina Teachers' and State Employees' Retirement System and have not been allowed to withdraw from the Retirement System and receive a refund of all their contributions to the System.

Pursuant to Rule 23(d)(2) the defendants shall give personal notice of this order to members of the plaintiff class. The cost of mailing the class action notices shall be borne by the defendants. *See Meadows v. Ford Motor Co.*, 62 F.R.D. 96, 101-02 (W.D. Ky. 1974).

STIPULATED DISMISSALS

Pursuant to the parties' 4 April 1985 stipulation, defendants Thomas Z. Osborne and the Board of Trustees of the Retirement System are dismissed from this action. This dismissal does not pertain to the individual members of said Board, who have been sued in their official capacities.

CONCLUSION

The plaintiffs' motions for class certification and summary judgment are granted. The defendants' motions to dismiss and for summary judgment are denied. The North Carolina State Commission for the Blind, from 1 July 1971 through 30 June 1973, and the Department of Human Resources, from 1 July 1973 through 30 Septem-

ber 1983, unlawfully deducted both the "employer" and "employee" contributions to the Retirement System from the plaintiffs' vending stand proceeds in violation of the Randolph-Sheppard Act. The plaintiffs are entitled to a refund of all funds held by the Retirement System which were contributed by the plaintiffs either as "employer" or "employee" shares.

It is hereby ORDERED that:

1. Within twenty (20) days from the filing date of this order, the parties shall file with this court a proposed notice to be mailed to members of the plaintiff class concerning the terms of this order. Specifically, the notice shall contain a brief description of the parties, the background of the case, and the relief granted by this order.

2. The defendants provide the plaintiffs with a full and complete accounting of all funds that have been contributed to the Retirement System as "employer" contributions; and

3. The Retirement System shall give members of the plaintiff class the option of receiving an immediate refund of both the "employer" and "employee" contributions to the Retirement System, reduced by the amount of benefits actually received, plus four per cent (4%) interest.

This 24 June 1985.

/s/ W. EARL BRITT
United States District Judge

APPENDIX E

JUDGMENT IN A CIVIL CASE

(Filed June 27, 1985)

United States District Court	District
Case Title ROBERT P. ALMOND, et al	EASTERN DISTRICT OF NORTH CAROLINA
v.	Docket Number
HARLAN E. BOYLES, et al	84-138-CIV-5
(See attached continuation list of parties)	Name of Judge or Magistrate Judge W. Earl Britt

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the parties' 4 April 1985 stipulation, defendants Thomas Z. Osborne and the Board of Trustees of the Retirement System are dismissed from this action. That the defendants' motions to dismiss and for summary judgment are denied. The plaintiffs' motions for class certification and summary judgment are granted and this action is hereby dismissed. The defendants are ordered to provide the plaintiffs with a full and complete accounting of all funds that have been contributed to the Retirement System as "employer" contribution. The Retirement System shall give members of the plaintiff class the option of receiving an immediate refund of both the "employer" and "employee" contributions to the Retirement System, reduced by the amount of benefits actually received, plus four per cent (4%) interest.

THE ABOVE JUDGMENT WAS FILED AND ENTERED TODAY, JUNE 27, 1985 AND COPIES MAILED TO THE FOLLOWING:

John Q. Beard
Robert W. Spearman
Steven J. Levitas
Sanford, Adams, McCullough & Beard
Post Office Box 389
Raleigh, N.C. 27602

Charles R. Hassell, Jr.
500 Capital Club Building
16 W. Martin Street
Raleigh, N.C. 27602

Barbara L. Nelson
American Council of the Blind
1211 Connecticut Ave.
Washington, D.C. 20036

William F. Briley
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602

Reginald L. Watkins
Special Deputy Attorney General
Norma S. Harrell
Assistant Attorney General
Post Office Box 629
Raleigh, N.C. 27602

CLERK
J. Rich Leonard
(By) DEPUTY CLERK
/s/ Lisa J. England

DATE
6-27-85

Continuation of Plaintiffs:

JERRY A. CALLOWAY
VERNON G. COX,
ALLEN E. DAIL,
JANICE D. DECKER,
DAVID W. GUTHRIE,
BRENDA M. HERRING,
SHERMAN L. LEWIS,
JANICE E. OSBORNE,
LESLIE T. SIMMONS,
On behalf of themselves and all other persons similarly situated.

Continuation of Defendants:

R. EUGENE BALLARD, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
EZRA A. BRIDGES, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
M.L. BYRD, in his or her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;

WILLIAM C. COVINGTON, JR., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
WITHERS DAVIS, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
COLLEEN JAKES, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
HORACE JERNIGAN, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
DAN W. JONES, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
V. GLENN MORTON, In his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
THOMAS Z. OSBORNE, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
A. CRAIG PHILLIPS, in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
THEO H. PITT, JR., in his official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
LINDA I. RADER, in her official capacity as a member of the Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System;
BOARD OF TRUSTEES OF THE NORTH CAROLINA TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM;
E. T. BARNES, in his official capacity as Deputy Treasurer of the State of North Carolina and as Director of the Retirement Systems Division;
DR. SARAH T. MORROW, in her official capacity as Secretary, North Carolina Department of Human Resources;
HERMAN GRUBER, in his official capacity as Director, Division of Services for the Blind, North Carolina Department of Human Resources;
MARY ANN VAN NAME, in her official capacity as Chief of Business Enterprises, Division of Services for the Blind, North Carolina Department of Human Resources.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of North Carolina
Article V

Sec. 6. Inviolability of sinking funds and retirement funds.

• • •

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee.

General Statutes of North Carolina

§ 135-1. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Accumulated contributions" shall mean the sum of all the amounts deducted from the compensation of a member and accredited to his individual account in the annuity savings fund, together

with regular interest thereon as provided in G.S. 135-8.

• • •

(25) "Teacher" shall mean any teacher, helping teacher, librarian, principal, supervisor, superintendent of public schools or any full-time employee, city or county, superintendent of public instruction, or any full-time employee of Department of Public Instruction, president, dean or teacher, or any full-time employee in any educational institution supported by and under the control of the State: Provided, that the term "teacher" shall not include any part-time, temporary, or substitute teacher or employee, and shall not include those participating in an optional retirement program provided for in G.S. 135-5.1. In all cases of doubt, the Board of Trustees, hereinafter [hereinbefore] defined, shall determine whether any person is a teacher as defined in this Chapter.

• • •

§ 135.5. Benefits.

• • •

(f) Return of Accumulated Contributions.—Should a member cease to be a teacher or State employee except by death or retirement under the provisions of this Chapter, he shall upon submission of an application be paid, not earlier than 60 days from the date of termination of service, his contributions, and if he has attained at least five years of membership service or if termination of his membership service is involuntary as certified by the employer, the accumulated regular interest thereon, provided that he has not in the meantime returned to service. Upon payment of such sum his membership in the System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered

except as provided in G.S. 135-4, and such payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable hereunder. Upon receipt of proof satisfactory to the Board of Trustees of the death, prior to retirement, of a member or former member there shall be paid to such person or persons as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the member's death, otherwise to the member's legal representatives, the amount of his accumulated contributions at the time of his death, unless the beneficiary elects to receive the alternate benefit under the provisions of (m) below. Notwithstanding any other provision of Chapter 135, there shall be deducted from any amount otherwise payable hereunder any amount due any agency or subdivision of the State by the member by reason of any outstanding overpayment of salary or by reason of the embezzlement of fees collected by the member for any agency or subdivision of the State; provided that, notwithstanding any other provisions of this Chapter, even if the member fails to demand the return of his accumulated contributions within 90 days from the day he ceases to be a teacher or State employee, any amount due such agency or subdivision by reason of any outstanding overpayment of salary or embezzlement of fees shall be paid to such agency or subdivision by the Retirement System upon demand; Provided, further, that such agency or subdivision shall have notified the executive director of any amount so due and that the Retirement System shall have no liability for amounts so deducted and transmitted to such agency or subdivision nor for any failure by the Retirement System for any reason to make such deductions.

§ 135-6. Administration.

(a) Administration by Board of Trustees; Corporate Name; Rights and Powers; Tax Exemption.—The general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of the Chapter are hereby vested in a Board of Trustees which shall be organized immediately after a majority of the trustees provided for in this section shall have qualified and taken the oath of office.

The Board of Trustees shall be a body politic and corporate under the name "Board of Trustees Teachers' and State Employees' Retirement System"; and as a body politic and corporate shall have the right to sue and be sued, shall have perpetual succession and a common seal, and in said corporate name shall be able and capable in law to take, demand, receive and possess all kinds of real and personal property necessary and proper for its corporate purposes, and to bargain, sell, grant, alien, or dispose of all such real and personal property as it may lawfully acquire. All such property owned or acquired by said body politic and corporate shall be exempt from all taxes imposed by the State or any political subdivision thereof, and shall not be subject to income taxes.

(b) Membership of Board; Terms.—The Board shall consist of 14 members, as follows:

(1) The State Treasurer, ex officio;

(2) The Superintendent of Public Instruction, ex officio;

(3) Ten members to be appointed by the Governor and confirmed by the Senate of North Carolina. One of the appointive members shall be a member

of the teaching profession of the State; one of the appointive members shall be an employee of the Board of Transportation, who shall be appointed by the Governor for a term of four years commencing April 1, 1947, and quadrennially thereafter; one of the appointive members shall be a representative of higher education appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one of the appointive members shall be a retired teacher who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one shall be a retired State employee who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1977, and quadrennially thereafter; one to be a general State employee, and three who are not members of the teaching profession or State employees; two to be appointed for a term of two years, two for a term of three years and one for a term of four years; one appointive member shall be a law-enforcement officer employed by the State, appointed by the Governor, for a term of four years commencing April 1, 1985. At the expiration of these terms of office the appointment shall be for a term of four years;

(4) Two members appointed by the General Assembly, one appointed upon the recommendation of the Speaker of the House of Representatives, and one appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither of these members may be an active or retired teacher or State employee or an employee of a unit of local government. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year

terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(c) Compensation of Trustees.—The trustees shall be paid during sessions of the Board at the prevailing rate established for members of State boards and commissions, and they shall be reimbursed for all necessary expenses that they incur through service on the Board.

(d) Oath.—Each trustee other than the ex officio members shall, within 10 days after his appointment, take an oath of office, that, so far as it devolves upon him, he will diligently and honestly administer the affairs of the said Board, and that he will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to the Retirement System. Such oath shall be subscribed to by the member making it, and certified by the officer before whom it is taken, and immediately filed in the office of the Secretary of State.

(e) Voting Rights.—Each trustee shall be entitled to one vote in the Board. Four affirmative votes shall be necessary for a decision by the trustees at any meeting of said Board.

(f) Rules and Regulations.—Subject to the limitations of this Chapter, the Board of Trustees shall, from time to time, establish rules and regulations for the administration of the funds created by this Chapter and for the transaction of its business. The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter.

(g) Officers and Other Employees; Salaries and Expenses.—The State Treasurer shall be ex officio chairman of the Board of Trustees. The Board of Trustees shall, by a majority vote of all the members, appoint a director, who may be, but need not be, one of its members. The salary of the director of the Retirement System is subject to the provisions of Chapter 126 of the General Statutes of North Carolina. The Board of Trustees shall engage such actuarial and other service as shall be required to transact the business of the Retirement System. The compensation of all persons, other than the director, engaged by the Board of Trustees, and all other expenses of the Board necessary for the operation of the Retirement System, shall be paid at such rates and in such amounts as the Board of Trustees shall approve, subject to the approval of the Director of the Budget.

(h) Actuarial Data.—The Board of Trustees shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the Retirement System, and for checking the experience of the System.

(i) Record of Proceedings; Annual Report.—The Board of Trustees shall keep a record of all of its proceedings which shall be open to public inspection. It shall publish annually a report showing the fiscal transactions of the Retirement System for the preceding year, the amount of the accumulated cash and securities of the System, and the last balance sheet showing the financial condition of the System by means of an actuarial valuation of the assets and liabilities of the Retirement System.

(j) Legal Adviser.—The Attorney General shall be the legal adviser of the Board of Trustees.

(k) Medical Board.—The Board of Trustees shall designate a medical board to be composed of not less than three nor more than five physicians not eligible to participate in the Retirement System. If required, other physicians may be employed to report on special cases. The medical board shall arrange for and pass upon all medical examinations required under the provisions of this Chapter, and shall investigate all essential statements and certificates by or on behalf of a member in connection with an application for disability retirement, and shall report in writing to the Board of Trustees its conclusion and recommendations upon all the matters referred to it.

(l) Duties of Actuary.—The Board of Trustees shall designate an actuary who shall be the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter and shall perform such other duties as are required in connection therewith.

(m) Immediately after the establishment of the Retirement System the actuary shall make such investigation of the mortality, service and compensation experience of the members of the System as he shall recommend and the Board of Trustees shall authorize, and on the basis of such investigation he shall recommend for adoption by the Board of Trustees such tables and such rates as are required in subsection (n), subdivisions (1) and (2), of this section. The Board of Trustees shall adopt tables and certify rates, and as soon as practicable thereafter the actuary shall make a valuation based on such tables and rates of the assets and liabilities of the funds created by this Chapter.

(n) In 1943, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the Retirement System, and shall make a valuation of the assets and liabilities of the funds of the System, and taking into account the result of such investigation and valuation, the Board of Trustees shall:

(1) Adopt for the Retirement System such mortality, service and other tables as shall be deemed necessary; and

(2) Certify the rates of contributions payable by the State of North Carolina on account of new entrants at various ages.

(o) On the basis of such tables and interest assumption rate as the Board of Trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the System created by this Chapter.

§ 135-7. Management of funds.

(a) Vested in Board of Trustees.—The Board of Trustees shall be the trustee of the several funds created by this Chapter as provided in G.S. 135-8.

(b) Regular Interest Allowance.—The Board of Trustees annually shall allow regular interest on the mean amount for the preceding year in each of the funds with the exception of the expense fund. The amounts so allowed shall be due and payable to said funds, and shall be annually credited thereto by the Board of Trustees from interest and other earnings on the moneys of the Retirement System. Any additional amount required to meet the interest on the funds of the Retirement System shall

be paid from the pension accumulation fund, and any excess of earnings over such amount required shall be paid to the pension accumulation fund. Regular interest shall mean such per centum rate to be compounded annually as shall be determined by the Board of Trustees on the basis of the interest earnings of the System for the preceding year and of the probable earnings to be made, in the judgment of the Board, during the immediate future, such rate to be limited to a minimum of three per centum (3%) and a maximum of four per centum (4%), with the latter rate applicable during the first year of operation of the Retirement System.

(c) Custodian of Funds; Disbursements; Bond of Director.—The State Treasurer shall be the custodian of the several funds and shall invest their assets in accordance with the provisions of G.S. 147-69.2 and 147-69.3.

* * *

§ 135-8. Method of financing.

(a) Funds to Which Assets of Retirement System Credited.—All of the assets of the Retirement System shall be credited according to the purpose for which they are held to one of four funds, namely, the annuity savings fund, the annuity reserve fund, the pension accumulation fund, and the pension reserve fund.

(b) Annuity Savings Fund.—The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Contributions to any payments from the annuity savings fund shall be made as follows:

(1) Prior to the first day of July, 1947, each employer shall cause to be deducted from the salary of each member on each and every payroll of such employer for each and every payroll period four per centum (4%) of his actual compensation; and the employer also shall deduct four per centum (4%) of any compensation received by any member for teaching in public schools, or in any of the institutions, agencies or departments of the State, from salaries other than the appropriations from the State of North Carolina. On and after such date the rate so deducted shall be five per centum (5%) of actual compensation except that, with respect to each member who is eligible for coverage under the Social Security Act in accordance with the agreement entered into during 1955 in accordance with the provisions of Article 2 of Chapter 135 of Volume 3B of the General Statutes, as amended, and with respect to members covered under G.S. 135-27, with such coverage retroactive to January 1, 1955, such deduction shall, commencing with the first day of the period of service with respect to which such agreement is effective, be at the rate of three per centum (3%) of the part of his actual compensation not in excess of the amount taxable to him under the Federal Insurance Contributions Act as from time to time in effect plus five per centum (5%) of the part of his earnable compensation not so taxable; provided that in the case of any member so eligible and receiving compensation from two or more employers such deductions may be adjusted under such rules as the Board of Trustees may establish so as to be as nearly equivalent as practicable to the deductions which would have been made had the member received all of such compensation from one employer. Notwithstanding the foregoing, the Board of Trustees may in its discretion cause such portion as it may determine of deductions made between January

1, 1955, and December 1, 1955, to be transferred into the contribution fund established under G.S. 135-24; such amounts so transferred shall in that event be deemed to be taxes contributed by employees as required under Article 2, Chapter 135 of Volume 3B of the General Statutes as amended, and shall be in lieu of contributions otherwise payable in the same amount as so required.

Notwithstanding the foregoing, effective July 1, 1963, with respect to the period of service commencing on July 1, 1963, and ending December 31, 1965, the rates of such deduction shall be four per centum (4%) of the portion of compensation not in excess of forty-eight hundred dollars ($4,800) and six per centum (6%) of the portion of compensation in excess of forty-eight hundred dollars ($4,800); and with respect to the period of service commencing January 1, 1966, and ending June 30, 1967, the rate of such deductions shall be four per centum (4%) of the portion of compensation not in excess of fifty-six hundred dollars ($5,600) and six per centum (6%) of the portion of compensation in excess of fifty-six hundred dollars ($5,600); and with respect to the period of service commencing July 1, 1967, and ending June 30, 1975, the rate of such deductions shall be five per centum (5%) of the portion of compensation not in excess of fifty-six hundred dollars ($5,600) and six per centum (6%) of the portion of compensation in excess of fifty-six hundred dollars ($5,600). Such rates shall apply uniformly to all members of the Retirement System, without regard to their coverage under the Social Security Act.

Notwithstanding the foregoing, effective July 1, 1975, with respect to the period of service commencing on July 1, 1975, the rate of such deductions shall be six per centum (6%) of the compensation received by any member. Such rates shall

apply uniformly to all members of the Retirement System, without regard to their coverage under the Social Security Act.

(2) The deductions provided for herein shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this Chapter. The employer shall certify to the Board of Trustees on each and every payroll or in such other manner as the Board of Trustees may prescribe, the amounts to be deducted; and each of said amounts shall be deducted, and when deducted shall be paid into said annuity savings fund, and shall be credited, together with regular interest thereon, to the individual account of the member from whose compensation said deduction was made.

(3) Each board of education of each county and each board of education of each city, and the employer in any department, agency or institution of the State, in which any teacher receives compensation from sources other than appropriations of the State of North Carolina shall deduct from the salaries of these teachers paid from sources other than State appropriations an amount equal to that deducted from the salaries of the teachers whose salaries are paid from State funds, and remit this amount to the State Retirement System. City boards of education and county boards of education in each and every county and city which has employees compensated from other than the

State appropriation shall pay to the State Retirement System the same per centum of the compensation that the State of North Carolina pays and shall transmit same to the State Retirement System monthly:

Provided, that for the purpose of enabling the boards of education to make such payment, the tax-levying authorities are hereby authorized, empowered and directed to provide the necessary funds therefor. In case the salary is paid in part from State funds and in part from local funds, the local authorities shall not be relieved of providing and remitting the same per centum of the salary paid from local funds as is paid from State funds. In case the entire salary of any teacher, as defined in this Chapter, is paid from county or local funds, the county or city paying such salary shall provide and remit to the Retirement System the same per centum that would be required if the salary were provided by the State of North Carolina.

* * *

(6) The contributions of a member, and such interest as may be allowed thereon, paid upon his death or withdrawn by him as provided in this Chapter, shall be paid from the annuity savings fund, and any balance of the accumulated contributions of such a member shall be transferred to the pension accumulation fund.

* * *

(d) Pension Accumulation Fund.—The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contribution made by employers and from which shall be paid all pensions and

other benefits on account of members with prior service credit. Contributions to and payments from the pension accumulation fund shall be made as follows:

(1) On account of each member there shall be paid in the pension accumulation fund by employers an amount equal to a certain percentage of the actual compensation of each member to be known as the "normal contribution," and an additional amount equal to a percentage of his actual compensation to be known as the "accrued liability contribution." The rate per centum of such contributions shall be fixed on the basis of the liabilities of the Retirement System as shown by actuarial valuation. Until the first valuation the normal contribution shall be two and fifty-seven one-hundredths percent (2.57%) for teachers, and one and fifty-seven one-hundredths percent (1.57%) for State employees, and the accrued liability contribution shall be two and ninety-four one-hundredths percent (2.94%) for teachers and one and fifty-nine one-hundredths percent (1.59%) of the salary of other State employees.

* * *

(f) Collection of Contributions.—

(1) The collection of members' contributions shall be as follows:

a. Each employer shall cause to be deducted on each and every payroll of a member for each and every payroll subsequent to the date of establishment of the Retirement System the contributions payable by such member as provided in this Chapter, and the employer shall draw his warrant for the amount so deducted, payable to the Teachers' and State Employees' Retirement System of North Carolina, and shall transmit the same, together with

schedule of the contributions, on such forms as prescribed.

(2) The collection of employers' contributions shall be made as follows:

a. Upon the basis of each actuarial valuation provided herein there shall be prepared biennially and certified to the Department of Administration a statement of the total amount necessary for the ensuing biennium to the pension accumulation and expense funds, as provided under subsections (d) and (f) of this section, and these funds shall be handled and disbursed in accordance with Chapter 100, Public Laws of 1929, and amendments thereto (G.S. 143-1 et seq.), known as the Executive Budget Act.

b. Until the first valuation has been made and the rates computed as provided in subsection (d) of this section, the amount payable by employers on account of the normal and accrued liability contributions shall be five and fifty-one one-hundredths percent (5.51%) of the payroll of all teachers and three and sixteen one-hundredths percent (3.16%) for other State employees.

c. The auditor shall issue his warrant to the State Treasurer directing the State Treasurer to pay this sum to the Board of Trustees from the appropriations for the Teachers' and State Employees' Retirement System.

d. Each board of education in each county and each board of education in each city in which teachers or other employees of the schools receive compensation for services in the public schools from sources other than the appropriation of the State of North Carolina shall pay the Board of Trustees of the State Retire-

ment System such rate of their respective salaries as are paid those of other employees.

e. Each employer shall transmit monthly to the State Retirement System on account of each employee, who is a member of this System, an amount sufficient to cover the normal contribution and the accrued liability contribution of each member employed by such employer for the preceding month.

(3) If within 90 days after request therefor by the Board any employer shall not have provided the System with the records and other information required hereunder or if the full accrued amount of the contributions provided for under this section due from members employed by an employer or from an employer other than the State shall not have been received by the System from the chief fiscal officer of such employer within 30 days after the last due date as herein provided, then, notwithstanding anything herein or in the provisions of any other law to the contrary, upon notification by the Board to the State Treasury as to the default of such employer as herein provided, any distributions which might otherwise be made to such employer from any funds of the State shall be withheld from such employer until notice from the Board to the State Treasurer that such employer is no longer in default.

(g) Merger of Annuity Reserve Fund and Pension Reserve Fund into Pension Accumulation Fund.—Notwithstanding the foregoing, effective at such date not later than December 31, 1959, as the Board of Trustees may determine, the annuity reserve fund and the pension reserve fund shall be merged into and become a part of the pension accumulation fund, provided that such merger shall in no way adversely affect the rights of any members or

retired members of the System and further provided the Board of Trustees shall be and hereby is authorized to make such changes in the accounting methods and procedures of the System from time to time as, in its opinion, are in the interest of sound and proper administration of the System.

§ 135-16.1. Blind or visually handicapped employees.

(a) On July 1, 1971, all blind or visually handicapped employees employed by the Department of Human Resources shall be enrolled as members of the Teachers' and State Employees' Retirement System. All such employees shall be given full credit for all service theretofore as employees of the Department of Human Resources. All retired employees drawing or receiving benefits from and under the private retirement plan purportedly created on December 6, 1966, by the Bureau of Employment for the Blind Division pursuant to a trust agreement purportedly entered into with a private banking institution as trustee shall continue to be paid by the Teachers' and State Employees' Retirement System benefits in the same amount which they purportedly were entitled to under the private retirement plan and trust agreement, except that such retired persons shall be eligible for such annual cost-of-living increases as may be provided for retirement members of the Teachers' and State Employees' Retirement System under the provisions of this Article.

(b) Upon the enrollment of the employees in the Teachers' and State Employees' Retirement System, the purported private retirement plan and trust agreement hereinabove referred to shall be dissolved and terminated.

(c) Notwithstanding the foregoing, blind persons licensed by the State and operating vending facilities under contract with the Department of Human Resources, Division of Services for the Blind and its successors, hereinafter referred to as licensed vendors, so licensed on and after October 1, 1983, shall not be members of the Retirement System. All licensed vendors in service or who are members of the Retirement System before October 1, 1983, shall make an irrevocable election to do one of the following:

(1) Continue contributing membership service as if an employee under the same conditions and requirements as are otherwise provided, and have the rights of a member to all benefits and a retirement allowance;

(2) Receive a return of accumulated contributions with cessation of contributing membership service, under G.S. 135-5(f), and in any event with regular interest regardless of membership service; or

(3) Terminate contributing membership service and be entitled alternatively to the benefits and allowances provided under G.S. 135-3(8) or 135-5(a).

§ 143A-6. Types of transfers.

* * *

(b) Under this Chapter, a Type II transfer means the transferring intact of an existing agency, or part thereof, to a principal department established by this Chapter. When any agency, or part thereof, is transferred to a principal department under a Type II transfer, that agency, or part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise

all its prescribed statutory powers independently of the head of the principal department, except that under a Type II transfer the management functions of any transferred agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

(c) Whenever the term "management functions" is used it shall mean planning, organizing, staffing, directing, coordinating, reporting and budgeting.

§ 143A-34. Teachers' and State Employees' Retirement System; transfer.

The Teachers' and State Employees' Retirement System, and the board of trustees, as contained in Article 1 of Chapter 135 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer.

FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1084

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARLAN E. BOYLES, *et al.*,

Petitioners,

v.

ROBERT P. ALMOND, *et al.*,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit

---

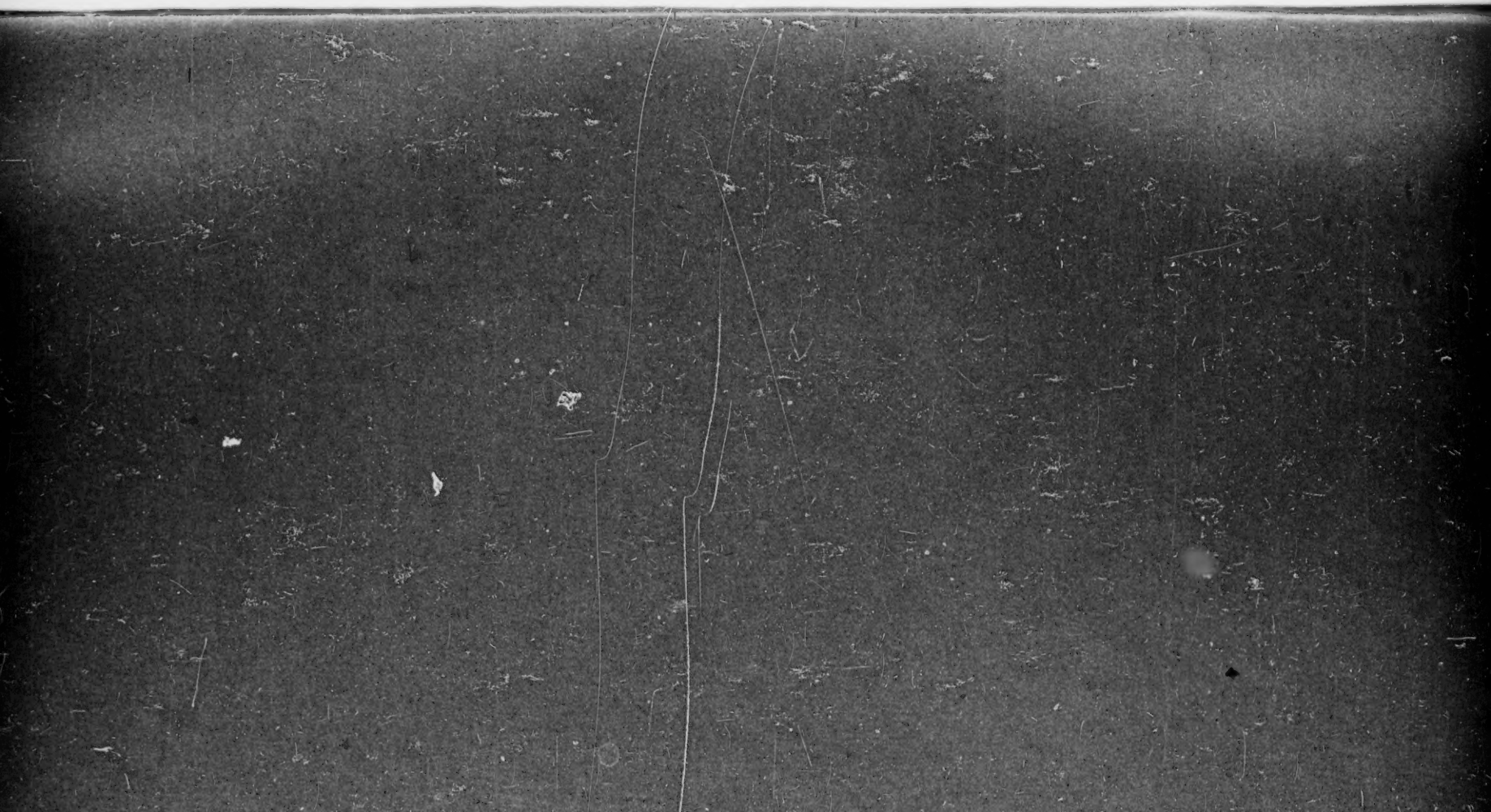
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT W. SPEARMAN*
STEVEN J. LEVITAS
ADAMS, MCCULLOUGH & BEARD
Post Office Box 389
One Exchange Plaza
Raleigh, North Carolina 27602
(919) 828-0564

CHARLES R. HASSELL, JR.
700 Commerce Building
19 West Hargett Street
Raleigh, North Carolina 27602
(919) 828-8746

Counsel for Respondents
(Counsel of Record)

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203



QUESTIONS PRESENTED

Whether the trial court and the Court of Appeals correctly determined that the Eleventh Amendment does not prevent blind concessionaires from recovering that portion of their earnings diverted from them, in violation of federal law, to petitioners.

Whether the trial court properly exercised its equitable discretion in awarding the relief requested.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	9
I. THE LOWER COURTS CORRECTLY DECIDED THAT PETITIONERS CANNOT CLOAK THEMSELVES IN THE STATE'S ELEVENTH AMENDMENT IMMUNITY AND THAT DECISION NEITHER CONFLICTS WITH DECISIONS OF THIS COURT NOR CREATES A CONFLICT AMONG THE CIRCUITS	9
II. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE DISCRETION AND THIS COURT SHOULD NOT GRANT THE PETITION TO REVIEW THE EXERCISE OF SUCH POWER	18
CONCLUSION	21
APPENDIX	
A. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1a
B. STIPULATIONS	7a

TABLE OF AUTHORITIES

CASES: Page

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) .. 16,18

Blake v. Kline, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980) 9,10,11,12,13

Brown v. Porcher, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150, 103 S. Ct. 796, 74 L. Ed. 2d 1000 (1983) 10,13

Cory v. White, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982) 16,17,18

Dillon v. Wentz, 227 N.C. 117, 41 S.E.2d 202 (1947) 14

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) 17,18

Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981) 12,16,18

Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 102 S. Ct. 3304, 73 L. Ed. 2d 1057 (1982) 17

Green v. Mansour, ___ U.S. ___, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) 16,17

Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796, 83 L. Ed. 2d 789 (1985) 10,12

Hopkins v. Clemson Agricultural College of South Carolina, 221 U.S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911) 10,12

Jacintoport Corp. v. Greater Baton Rouge Port Commission, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986) 10,13

Table of Authorities Continued

	Page
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)	13
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)	16,17,18
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971)	19
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Const. amend. XI	*passim*
20 U.S.C. § 107b(3)(1970)	4
20 U.S.C. §§ 107-107f (1982)	*passim*
Act of Dec. 7, 1974, Pub. L. 93-516, Title II, § 204, 88 Stat. 1625 (*amending* 20 U.S.C. § 107b)	4
N. C. Const. art. V, § 6	6,14
N. C. Gen. Stat. § 135-1(1)	14
N. C. Gen. Stat. § 135-1(11) (1981), *amended by* 1983 N. C. Sess. Laws, Chapter 412, § 2	6
N. C. Gen. Stat. § 135-2	5,12
N. C. Gen. Stat. § 135-5(f)	7,14
N. C. Gen. Stat. § 135-6	5,12
N. C. Gen. Stat. § 135-7(b)	14,15
N. C. Gen. Stat. § 135-8	13
N. C. Gen. Stat. § 135-16.1	20
N. C. Gen. Stat. § 135-27	6
1971 N. C. Sess. Laws, Chapter 1025	5
1983 N. C. Sess. Laws, Chapter 867	8

Table of Authorities Continued

Page

MISCELLANEOUS:

Annotation, *Vested Right of Pensioner to Pension*, 52 A.L.R.2d 437 (1957 and Later Case Serv.) 15

D. Dobbs, *Handbook on the Law of Remedies* § 4.1 (1978) 19

13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3524 (1984) 9,10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1084

HARLAN E. BOYLES, *et al.*,

Petitioners,

v.

ROBERT P. ALMOND, *et al.*,

Respondents.

On Petition For Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Robert P. Almond et. al., are visually handicapped North Carolina residents licensed as vending stand operators under the federal Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1982). They respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit Court of Appeals' judgment in the case entered on June 6, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Eleventh Amendment to the United States Constitution, which is set out in the

petition for writ of certiorari ("Petition") at 2, and the North Carolina constitutional and statutory provisions reproduced in Appendix F to the Petition, this case involves the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1982), and, in particular, 20 U.S.C. § 107b, which is reproduced in Appendix A to this brief. Appendix A also contains relevant provisions of the North Carolina General Statutes not reproduced in the Petition.

STATEMENT OF THE CASE

The district court's accurate and succinct account of the background giving rise to this dispute can be found at pages A-19 through A-23 of the Petition. Respondents offer the following Statement of the Case to provide some additional detail as well as citations to the stipulations of undisputed fact filed by all parties in the district court. The stipulations themselves are reproduced in Appendix B *infra* and the exhibits thereto are contained in the Joint Appendix in the Court of Appeals ("JA"), a copy of which has been lodged with this Court.

A. The Randolph-Sheppard Vending Program

In 1936, Congress enacted the Randolph-Sheppard Act to provide business opportunities for the visually handicapped. Act of June 20, 1936, Ch. 638, §§ 1-10, 49 Stat. 1559-1560 (codified as amended at 20 U.S.C. §§ 107-107f (1982)). Under the Act as amended, the federal Rehabilitation Services Administration ("RSA") is authorized to designate a state agency to license visually handicapped persons to operate vending facilities on federal and other property within the State. 20 U.S.C. §§ 107a and 107b. The licensing agency also administers the vending stand program

(the "program") within the State. 20 U.S.C. § 107b (Appendix A at 1a). Since 1955, the North Carolina Department of Human Resources, Division of Services for the Blind, and its predecessor agencies ("DHR") have been designated as the Randolph-Sheppard licensing agency in North Carolina and have administered the Randolph-Sheppard program in North Carolina. Stipulations 2-4 (Appendix B at 7a-8a).

North Carolina has never appropriated any funds for the administration or operation of the vending stand program. Stipulation 19 (Appendix B at 14a). The costs of administering the program have always been paid primarily with federal funds. Stipulation 6 (Appendix B at 8a); *see also* JA at 80. Specifically, the State has used a portion of its federal Vocational Rehabilitation grant to fund the program. The non-federal share of the program budget has come primarily from monies generated through the vendors' stand sales. Stipulation 6 (Appendix B at 8a).

In applying for designation as Randolph-Sheppard licensing agency, and in exchange for the federal grants it has received to operate the program, State officials and agencies have agreed to administer the program in accordance with the Randolph-Sheppard Act and regulations promulgated thereunder. Stipulation 7 (Appendix B at 9a).

Prior to 1974, the Randolph-Sheppard Act provided that deductions from the "proceeds" of vending facilities could be "set aside" for only four specific purposes:

1. Maintenance and replacement of equipment;
2. The purchase of new equipment;
3. Management services; and

4. Assuring a fair minimum return to operators of vending stands.

20 U.S.C. § 107b(3) (1970); *see* Petition at A-20. The Act further provided that "in no event shall the amount of such funds to be set aside from the proceeds of a vending stand exceed a reasonable amount which shall be determined by the Secretary." *Id.* In 1974, Congress amended the Act to provide that vending stand proceeds could be set aside for an additional purpose: the purchase of retirement benefits and other fringe benefits for the vendors, *but only if a majority of blind vendors in the state vote for such benefits to be purchased after full disclosure by the licensing agency of all information relevant to any proposed benefit program.* Act of Dec. 7, 1974, Pub. L. 93-516, Title II, § 204, 88 Stat. 1625 (*amending* 20 U.S.C. § 107b); *see* Appendix A at 2a.

B. The Vendors and the Retirement System

Although the Randolph-Sheppard Act and regulations have always provided that the profits of vending stands (less any money properly set aside for an authorized purpose) belong to the vendors, prior to July, 1971 vendors in North Carolina were paid a flat weekly salary. Stipulation 11 (Appendix B at 10a). The profits generated by the stands were retained by DHR's predecessor, the Bureau of Employment for the Blind, which used some of these unlawfully retained profits to establish an inadequate retirement program for the vendors. Petition at A-21; *see also* JA at 109-116, 120-164. In 1969, $300,000.00 of the undistributed vending stand profits were transferred into the General Fund of the state. Stipulation 14 (Appendix B at 11a); JA at 117. Finally, in July, 1971, the method of compensating North Carolina vendors

was modified in an apparent attempt to bring the State's program into compliance with the Randolph-Sheppard Act. At the same time, the General Assembly, without regard for the Randolph-Sheppard Act, declared the vendors to be State employees, enrolled them involuntarily in the North Carolina Teachers' and State Employees' Retirement System ("Retirement System"), and transferred to the Retirement System the assets (amounting to $163,490.09) of the private retirement plan created by the Bureau with the vendors' funds from their stand proceeds. 1971 N. C. Sess. Laws, Chapter 1025; Stipulation 17 (Appendix B at 12a); JA at 165-167.

No vote was ever held to determine whether a majority of the blind vendors wished to participate, or to continue participating, in the Retirement System and to have contributions to the System deducted from their earnings. Stipulation 9 (Appendix B at 9a-10a); JA at 220, 221 (¶ 4).

* * *

As the district court found, the Retirement System is vested with the "power and privileges" of a corporation, and is administered by a board of trustees which has the right to sue and be sued. Opinion and Order of the District Court, Petition at A-25; N. C. Gen. Stat. §§ 135-2 (Appendix A at 3a), 135-6 (Petition at A-38).[1] It may acquire and dispose of real and personal property and hold such property in its corporate name. *Id.* During the years that respondents were forced to participate in the Retirement System, its members included employees of state agencies, as

[1] Except where otherwise indicated, all citations to the North Carolina General Statutes are to the 1986 code.

well as the employees of various non-state and private entities, such as county and city school boards, the North Carolina Symphony Society, Inc., the North Carolina Art Society, Inc., the North Carolina Education Association, the North Carolina State Employees' Association, the North Carolina Firemen's Association, the North Carolina Highway Employees Association, the North Carolina Teachers' Association, the State Employees' Credit Union, alumni associations of state-supported universities and colleges, local professional associations of teachers and state employees, and the North Carolina School Boards Association. *See* N. C. Gen. Stat. §§ 135-1(11) (1981) (Appendix A at 3a); N. C. Gen. Stat. § 135-27 (Appendix A at 4a-6a). Under state law, contributions to the Retirement System are divided into two parts, the "employer" contribution and the "employee" contribution. The System's assets include these contributions made by state and non-state employers and employees, as well as very substantial investment income. Petition at A-25. Funds in the Retirement System, by state law, may not be used for general state purposes. N. C. Const. art. V, § 6.

In the case of any other participant in the Retirement System, an employer entity makes the "employer" contribution to the System on that person's behalf. However, neither the State nor any other entity ever appropriated or spent any funds for "*employer*" contributions to the Retirement System on behalf of the blind vendors. Stipulation 19 (Appendix B at 14a). Rather, DHR deducted (or set aside) the "*employer*" contribution from each vendor's stand proceeds and then deducted the "*employee*" contribution from the gross pay distributed to the vendor.

Stipulation 18 (Appendix B at 14a); JA 220-221 (2-3). In short, DHR took from the visually handicapped vendors monies amounting to *both* the "employer" and the "employee" share of retirement contributions and transferred those monies to the Retirement System.

Despite this fact, on those occasions when vendors left the program over the years and were allowed to withdraw from the Retirement System, the System refunded to them *only* that portion of their contributions comprising the "employee" share, plus statutory interest. JA at 180-181, 184-199. The vendors were not allowed to withdraw the so-called "employer" share, although it had been taken from them rather than paid by the State or by anyone else. Pursuant to N. C. Gen. Stat. § 135-5(f) (Petition at A-36-37), other Retirement System members who withdraw from the System receive a full refund of *all* contributions they have made to the System.

In March 1982, the federal government (RSA) informed DHR that "North Carolina's Randolph-Sheppard program [was in] an awkward, possibly illegal, administrative posture." Stipulation 23 (Appendix B at 14a); JA at 182-183. Among other things, RSA complained about the program's classification of vendors as State employees and its use of the vendors' earnings to make the "employer" contributions to the Retirement System. *Id.* In an effort to bring the North Carolina vending stand program into compliance with the governing Randolph-Sheppard Act, the 1983 Session of the North Carolina General Assembly enacted Senate Bill 247, which provided that after September 30, 1983, the vending stand operators would be classified not as state employees but as independent con-

tractors, and that individuals licensed in the future as vendors would not be required (or permitted) to participate in the Retirement System. 1983 N.C. Sess. Laws, Chapter 867; Stipulation 25, (Appendix B at 15a); JA at 200-201.

Pursuant to this recent Act, licensed vendors who had been participating in the Retirement System were required to make an irrevocable election by September 30, 1983, (1) to continue contributing *both* the "employer" and "employee" shares to the Retirement System; or (2) to cease contributing to the System *and* (a) receive a refund of only "employee" contributions, plus statutory interest; (b) apply for and commence receiving a monthly retirement allowance; or (c) leave accumulated contributions in the System and retain the right to receive an actuarially reduced pension at some future date. Stipulation 26 (Appendix B at 15a); JA at 202-211.

Although both the "employer" and the "employee" contributions to the System on the vendors' behalf were always paid with money taken from the vendors—and not with State funds—they were not given the option to withdraw both their "employer" and "employee" contributions from the System. Id.; JA at 220-221 (¶ 3).

After attempting unsuccessfully to resolve this matter through administrative channels, respondents brought this action on behalf of themselves and all others similarly situated to recover *all* monies contributed *by them* to the Retirement System, including so-called "employer" contributions, which were unlawfully and unconstitutionally withheld from them and retained by the petitioners. The district court

granted respondents' motion for summary judgment and the Court of Appeals affirmed.

The petitioners do not seek review of the district court and Court of Appeals decisions that the blind vendors' earnings were wrongfully diverted from them to the Retirement System in violation of the Randolph-Sheppard Act. Petitioners do assert that *certiorari* should be granted to consider (1) whether the Eleventh Amendment insulates the Retirement System trustees against a directive to return to the blind vendors their earnings wrongfully taken; and (2) whether such a directive is equitable.[2]

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY DECIDED THAT PETITIONERS CANNOT CLOAK THEMSELVES IN THE STATE'S ELEVENTH AMENDMENT IMMUNITY AND THAT DECISION NEITHER CONFLICTS WITH DECISIONS OF THIS COURT NOR CREATES A CONFLICT AMONG THE CIRCUITS.

This case concerns the status, for Eleventh Amendment immunity purposes, of the North Carolina Teachers' and State Employees' Retirement System.[3]

---

[2] Phillip J. Kirk, Secretary of the North Carolina Department of Human Resources ("DHR"); Herman Gruber, Director of DHR's Division of Services for the Blind ("the Division"); and Mary Ann Van Name, Chief of Business Enterprises within the Division, are also defendants in this action but have not petitioned this court for a writ of *certiorari*.

[3] As the lower courts specifically and correctly held, this question is one of federal law. *See, e.g., Blake v. Kline*, 612 F.2d 718, 722 (3rd Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed.2d 1112 (1980). *See generally* 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3524 at 138 & n.32 (1984).

Contrary to petitioners' contention, Petition at 16-20, the analytical approach employed by the courts below is entirely consistent with that used by other Courts of Appeals, and by this Court, in determining whether a particular entity is entitled to assert a state's Eleventh Amendment immunity. Specifically, in this type of case courts consider and weigh factors such as the autonomy of the entity, whether under state law it may hold and dispose of property in its own name, whether it is authorized to sue and be sued, its funding sources, and whether a judgment against it would impinge upon the state treasury. *See, e.g., Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911)(state agricultural college not entitled to assert State's Eleventh Amendment immunity); *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796, 83 L. Ed. 2d 789 (1985). *See generally* 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3524 at 135-36 (1984).

The courts of appeals have applied this type of analysis to a wide variety of entities and have concluded that certain ones may share in a state's Eleventh Amendment immunity while others may not. *Compare Hall v. Medical College with Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, ___U.S. ___, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986); *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150, 103 S. Ct. 796, 74 L. Ed. 2d 1000 (1983). Each case necessarily involves a detailed anal-

ysis of the organization and operation of the particular entity in question and is thus *sui generis*.

No other circuit court has passed on the Eleventh Amendment status of the Retirement System. Nor do any of the cases relied on by petitioners involve an analysis of some *other* retirement system. The sole retirement system case cited by petitioners, *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980), held that the district court had erred in dismissing an action against the Public School Employees' Retirement Board of Pennsylvania on Eleventh Amendment grounds. (The Third Circuit's Eleventh Amendment analysis in *Blake* was specifically approved and utilized by the district court in this case. Petition at A-26.) Retirement benefits are provided to public employees in different places through an immense variety of means, with varying systems of public and private, employer and employee participation, contribution, and funding. The result in this case does not mean that the Fourth Circuit would reach a similar result regarding another retirement system in another state within its jurisdiction. And the specific holding of this case has little precedential value with respect to other agencies affiliated with governments.

In the final analysis, petitioners' quarrel with the decision below involves the particular facts found as a result of the court's interpretation and analysis of a complicated, unique set of circumstances. Not only is this issue particularly inappropriate for review on *certiorari*, but the district court reached the correct result.

Having carefully reviewed the complex relationship of the Retirement System to the State of North Carolina, Judge Britt concluded that "[t]he 'autonomy' factor does not weigh heavily in favor of either party in this case." Petition at A-25. Although the State exercises some control over the Retirement System, the System is vested with "the power and privileges of a corporation," N. C. Gen. Stat. § 135-2 (Appendix A at 3a), and is administered by a Board of Trustees, which is "a body politic and corporate" with the right to sue and be sued and to acquire and dispose of real and personal property, N. C. Gen. Stat. § 135-6 (Petition at A-38), and which holds all property acquired in the corporate name. *Id.*; N. C. Gen. Stat. § 135-2 (Appendix A at 3a).[4]

---

[4] As petitioners point out, this Court has held that the designation under state law of a department of state government as a "body corporate" with the capacity to "sue and be sued" does not constitute a waiver of Eleventh Amendment immunity. Petition at 12 (citing *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981)). In *Florida Department of Health* there was no question whether the Department of Health was an arm of the state entitled to assert its immunity; rather, the issue was whether the state had waived its immunity with respect to that department. Here, by contrast, the issue is not one of *waiver* but of whether the entity in question has any claim at all to the state's immunity. Whether an entity is a body corporate, with the power to hold property and to sue and be sued *has* been considered relevant to *that* issue. *See, e.g., Hopkins* 221 U.S. at 646; *Hall*, 742 F.2d at 305-06; *Blake*, 612 F.2d at 725. Moreover, although the district court found that the factors discussed in the text weigh against the Retirement System's claim to be an alter-ego of the State, those factors were by no means dispositive.

Given the inconclusiveness of the 'autonomy' analysis, the district court correctly placed great emphasis on the fact that the monies respondents seek to recover would not come from the general revenues of the State. Petition at A-25-27. Courts of Appeals have repeatedly recognized the particular importance for Eleventh Amendment analysis of whether a judgment will have to be paid from the state treasury. *Jacintoport*, 762 F.2d at 441; *Brown v. Porcher*, 660 F.2d at 1006-1007; *Blake v. Kline*, 612 F.2d at 723.

Petitioners cannot dispute that the relief awarded by the court below—a refund of contributions respondents were wrongfully required to make to the Retirement System—would not be paid from the State treasury or from the general revenues of North Carolina. Rather, it would be paid from separate and independent pension funds maintained by the trustees of the Retirement System. *See* N. C. Gen. Stat. § 135-8 (Petition at A-44-52).

Although some of the monies held by the Retirement System defendants were originally appropriated by the North Carolina General Assembly, a much more substantial portion of those monies have come from other sources, including State employees, non-State employers (such as county and city school boards, the North Carolina Association of Educators, the North Carolina Symphony Society, Inc., and the other private entities identified *supra* at 6), the employees of these non-State and private entities, and investment income. *Cf. Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (11th Amendment does not bar suit against school board despite fact that board received "a significant amount of money from the

State"). Indeed, this diversity of membership, with funding and participation by various private employers and private employees, is one obvious factor distinguishing this retirement system from others, as well as from departments of state government.

In addition, participants in the Retirement System who withdraw from it are entitled to a refund of their accumulated contributions plus only 4% interest, *see* N. C. Gen. Stat. §§ 135-5(f), 135-1(1), 135-7(b) (Petition at A-35-44), despite the fact that their accumulated contributions have earned far more than 4% in investment income. *See* JA at 253, 272 (average annual yield of approximately 7.5%). The balance of investment income on *employee* contributions (as well as all the income on employer contributions) remains with the Retirement System. This "excess" investment income to the Retirement System on employee contributions from a single year is many times greater than the monetary relief sought in this action. (Of course, what respondents seek is a refund of monies taken from *themselves alone*.)

Moreover, unlike the funds in the State Treasury—or even those funds in certain segregated State accounts—the State is not free to dispose of Retirement System funds at its pleasure. *See* N.C. Const. art. V, § 6 (Petition at A-35). Beneficiaries of the System have a clearly defined equitable interest in the monies held in the Annuity Savings Fund and, with respect to vested beneficiaries, in the Pension Accumulation Fund as well. *Cf. Dillon v. Wentz*, 227 N.C. 117, 41 S.E.2d 202 (1947) (members of public employee retirement system funded wholly or in part by contributions of members have a vested interest in the assets of the fund upon becoming eligible for retire-

ment). *See generally* Annotation, *Vested Right of Pensioner to Pension*, 52 A.L.R.2d 437 (1957 and Later Case Serv.).

Petitioners suggest that even though a judgment against them will not be paid out of the general revenues of North Carolina, such a judgment would indirectly result in increased appropriations from the general revenues to the Retirement System. Petition at 13. However, the district court carefully considered this argument and rejected it. Petition at A-27. It correctly concluded that "the relief requested by the plaintiffs would [not] *inevitably* lead to an additional appropriation of state fund[s, . . . because it] may be satisfied by investment income or a slight decrease in the amount of benefits paid to other beneficiaries of the Retirement System." *Id.* (emphasis added). Although petitioners themselves acknowledged below that the relief ordered could be offset by a decrease in benefits to members of the Retirement System, Brief of Appellants at 12, they now claim, without citation, that they cannot "decrease benefits without either violating state law or obtaining a legislative change . . . ." Petition at 13-14. Be that as it may, they have never disputed respondents' contention made below that they could offset the entire judgment at once by exercising their discretion under N. C. Gen. Stat. § 135-7(b) to set the "regular interest" credited to the Annuity Savings Fund at a rate slightly lower than 4% for a single year.[5] The lower

---

[5] "Regular interest" is that amount credited annually by the Retirement System defendants from the Pension Accumulation Fund to the Annuity Savings Fund. *See* N. C. Gen. Stat. § 135-7(b) (Petition at A-43-44). As petitioners explain in their petition at 5-6, the resources of the Retirement System are held in two

courts, then, correctly concluded that the relief sought will not inevitably impinge upon the general revenues of North Carolina maintained in the State Treasury.

Although the courts below thus employed the proper analytical approach and reached the correct result on the unique facts of this case, petitioners insist, wrongly, that "the decision below is wholly inconsistent with language of this Court in recent cases." Petition at 10 (citing *Green v. Mansour*, ___ U.S. ___, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Cory v. White*, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982); *Florida Department of Health and Rehabilitative Services v.*

---

funds: (1) *the Annuity Savings Fund*, which consists of "employee" contributions to the System plus interest paid into that Fund on an annual basis from the Pension Accumulation Fund; and (2) the *Pension Accumulation Fund*, which consists of (a) monies paid to the System as "employer" contributions, (b) the "employee" contributions of retired members which are transferred to the Pension Accumulation Fund upon the member's retirement, and (c) all investment earnings of the Retirement System except the interest paid annually on individual "employee" contribution accounts. The investment earnings on monies held in the Annuity Savings Fund remain in the Pension Accumulation Fund except for the "regular interest" credited annually. N. C. Gen. Stat. § 135-7(b) vests in the Retirement System defendants the discretion to set "regular interest" anywhere between 3% and 4%. By reducing "regular interest" from its present level of 4% to 3.9% *for a single year*, the Retirement System defendants could offset the relief awarded without requiring an increase in appropriations from the general revenues of North Carolina.

Florida Nursing Home Association. 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981)).

None of these cases in any way involved the question whether a particular entity was entitled to assert a state's Eleventh Amendment immunity. *Green*, *Pennhurst*, and *Cory v. White* all involved the scope of the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).[6] Specifically, *Green* held that the *Ex parte Young* doctrine does not permit "notice" or declaratory relief against state officials except where ancillary to appropriate injunctive relief. *Pennhurst* held that *Ex parte Young* does

---

[6] *Ex parte Young* and its progeny "make clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689, 102 S. Ct. 3304, 3317, 73 L. Ed. 2d 1057 (1982). Although such actions may have an obvious impact on the state itself, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst*, 465 U.S. at 102, 104 S. Ct. at 909 (quoting *Young*, 209 U.S. at 160).

The lower courts' holding—that the Retirement System is not an arm of the State entitled to assert its Eleventh Amendment immunity—does not rely on the *Ex parte Young* doctrine. Respondents did, however, argue in the alternative below that if the Retirement System were, as a general matter, entitled to assert the State's Eleventh Amendment immunity, the relief requested could nonetheless be awarded because petitioners have expropriated respondents' property in violation of the Fourteenth Amendment and respondents do not seek a damages award from the State treasury. Brief of Plaintiffs-Appellees at 17-20, 26-30. In light of their decision on "alter-ego" grounds, the lower courts did not reach this argument.

not authorize a federal court to award relief against state officials on the basis of *state* law because to do so is not necessary to vindicate the supreme authority of federal law.[7] Similarly, *Cory v. White* held that *Ex parte Young* does not authorize federal courts to entertain federal interpleader actions against state officials because such suits do not involve a violation of federal (or state) law. *Atascadero* and *Florida Department of Health* involved the question whether a state has waived its Eleventh Amendment immunity. (*Atascadero* also involved a question of Fourteenth Amendment abrogation of Eleventh Amendment immunity.)

Although petitioners would like to make much of plaintiffs' lack of success in this Court's recent Eleventh Amendment cases, none of these cases in any way casts doubt on the lower courts' framework of analysis or result. The petition should therefore be denied.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE DISCRETION AND THIS COURT SHOULD NOT GRANT THE PETITION TO REVIEW THE EXERCISE OF SUCH POWER.

Finally, petitioners ask this Court to consider whether the trial court properly exercised its equitable power in granting the relief sought by respondents. The exercise of such equitable power is committed to the discretion of trial courts and should

---

[7] If, as the lower courts held, petitioners are not entitled to assert the State's Eleventh Amendment immunity *at all*, *Ex parte Young*, and the limits placed on it in *Pennhurst*, do not come into play. Thus, petitioners' invocation of *Pennhurst* in their second question presented and in their petition at 20 is misplaced.

be disturbed by an appellate court only for a clear showing of an abuse of discretion. The scope of a district court's equitable power to remedy past wrongs is broad. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971). Given these well-established principles, based as they are on a trial court's peculiar advantage in fashioning relief appropriate to the facts before it, this final issue presented by petitioners is particularly inappropriate for review on writ of *certiorari*.

The district court ordered petitioners to return earnings wrongfully taken from respondents. In ruling that equity so requires, the district court specifically and correctly rejected the petitioners' arguments that they would not be unjustly enriched if allowed to keep respondents' funds. As the court observed:

> [t]he principle of equitable restitution is to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance . . . .' D. Dobbs, *Handbook on the Law of Remedies*, § 4.1 at 224 (1978).

Petition at A-24.

It is inequitable for petitioners to keep respondents' monies because those monies have been a windfall and unjust enrichment to the System and its members. Unlike other "employer" contributions to the Retirement System, the so-called "employer" contributions made on behalf of respondents came *not* from State revenues, but from the blind vendors' earnings. Petitioners have not disbursed, and respondents have

not received, anything of value in exchange for those wrongfully taken earnings. Moreover, the relief awarded below can be funded by a miniscule decrease in the level of interest paid to other Retirement System members, which reduction respondents are authorized to make. *See supra* p. 15 & n.5. In addition, the district court's award allows petitioners to retain a substantial portion of the investment earnings they have realized on respondents' funds since 1971. (The district court awarded pre-judgment interest of 4%, whereas Retirement System investment earnings have averaged 7.5%. *See* JA at 253, 272).

Finally, petitioners appear to argue that the result below is inequitable because blind vendors who will benefit by withdrawing from the Retirement System may do so, while those who might profit by remaining in the System may do that. Petition at 21. But this result is not inappropriate because under State law any blind vendor who now might choose to remain in the System would have to continue to pay *both* "employer" and "employee" contributions. N.C. Gen. Stat. § 135-16.1 (Petition at A-52-53); Stipulation 26 (Appendix B at 15a).

The district court's carefully crafted equitable remedy presents no issue appropriate for review on *certiorari*.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

This the 30th day of January, 1987.

ROBERT W. SPEARMAN*
STEVEN J. LEVITAS
ADAMS, MCCULLOUGH & BEARD
Post Office Box 389
One Exchange Plaza
Raleigh, North Carolina 27602
(919) 828-0564

CHARLES R. HASSELL, JR.
700 Commerce Building
19 West Hargett Street
Raleigh, North Carolina 27602
(919) 828-8746

*(*Counsel of Record*)

APPENDIX

Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 USC § 107b (1982)

§ 107b. Application for Designation as State Licensing Agency—Cooperation with Secretary—Stock and Equipment.

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree—

(1) to cooperate with the Secretary in carrying out the purpose of this Act [20 U.S.C. §§ 107 *et. seq.*];

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: Provided, however, That such equipment and stock may be owned by the licensing agency for the use of the blind, or by the blind individual to whom the license is issued: And provided further, That if the ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing.

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities: Provided, however, That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside from such purposes;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this Act [20 U.S.C. §§ 107 *et seq.*], as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise

resolved by such hearing to arbitration as provided in section 5 of this Act [29 U.S.C. § 107d].

North Carolina General Statutes

N. C. Gen. Stat. § 135-1 (1981). Definitions.

* * *

(11) "Employer" shall mean the State of North Carolina, the county board of education, the city board of education, the State Board of Education, the board of trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, or any other agency of and within the State by which a teacher or other employee is paid. "Employer" shall also mean the North Carolina Symphony Society, Inc., and the North Carolina Art Society, Inc.

* * *

N. C. Gen. Stat. § 135-2. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina. The Retirement System so created shall be established as of the first day of July, 1941.

It shall have the power and privileges of a corporation and shall be known as the "Teachers' and State Employees' Retirement System of North Carolina," and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held.

N. C. Gen. Stat. § 135.27. Transfers from State to certain association service.

(a) Any member whose service as a teacher or State employee is terminated because of acceptance of a position prior to July 1, 1983, with the North Carolina Education Association, the North Carolina State Employees' Association, North Carolina State Firemen's Association, the North Carolina State Highway Employees Association, North Carolina Teachers' Association and the State Employees' Credit Union, alumni associations of state-supported universities and colleges, local professional associations of teachers and State employees as defined by the Board of Trustees, and North Carolina State School Boards Association may elect to leave his total accumulated contributions in this Retirement System during the period he is in such association employment, by filing with the Board of Trustees at the time of such termination the form provided by it for that purpose.

(b) Any member who files such an election shall remain a member of the Retirement System during the time he is in such association employment and does not withdraw his contributions. Such a member shall be entitled to all the rights and benefits of the Retirement System as though remaining in State service on the basis of the funds accumulated for his credit at the time of such transfer plus any additional accruals on account of future contributions made as hereinafter provided. Such former State employee may restore any such account and pay into the annuity savings fund before July 1, 1960, such amounts as would have been paid after transfer to such service, provided that the association makes contributions to the Retirement System on behalf of such former members in accordance with subsection (c) of this section.

(c) Under such rules as the Board of Trustees shall adopt, the association to which the member has been transferred may agree to contribute to the Retirement System

on behalf of such member such current service contributions as would have been made by his employer had he remained in State service with actual compensation equal to the remuneration received from such association; provided the member continues to contribute to the Retirement System. Any period of such association employment on account of which contributions are made by both the association and the member as herein provided shall be credited as membership service under the Retirement System.

(d) The governing board of any association or organization listed in subsection (a), in its discretion, may elect on or before July 1, 1983, by an appropriate resolution of said board, to cause the employees of such association or organization so employed prior to July 1, 1983, to become members of the Teachers' and State Employees' Retirement System. Such Retirement System coverage shall be conditioned on such association's or organization's paying all of the employer's contributions or matching funds from funds of the association or organization and on such board's collecting from its employees the employees' contributions at such rates as may be fixed by law and by the regulations of the Board of Trustees of the Retirement System, all of such funds to be paid to the Retirement System and placed in the appropriate funds. Retroactive coverage of the employees of any such association or organization may also be effected to the extent that such board requests; provided, the association or organization shall pay all of the employer's contributions or matching funds necessary for such purposes; and, provided further, such association or organization shall collect from its employees all employees' contributions necessary for such purpose, computed at such rates and in such amount as the Board of Trustees of the Retirement System shall determine, all of such funds to be paid to the Retirement System, together with such interest as may be due, and placed in the appropriate funds. The provisions of this subsection shall be

fully applicable to the North Carolina Symphony Society, Inc. and the North Carolina Art Society, Inc.

(e) Notwithstanding the foregoing, employees of the State Employees' Credit Union who are in service and members of the Retirement System on June 30, 1983, shall, on or before October 1, 1983, make an irrevocable election to do one of the following:

(1) Continue contributing membership service under the same conditions and requirements as are otherwise provided, and have the rights of a member to all benefits and a retirement allowance; or

(2) Receive a return of accumulated contributions with cessation of contributing membership service, under G.S. 135-5(f) and in any event with regular interest regardless of membership service; or

(3) Terminate contributing membership service and be entitled alternatively to the benefits and allowances provided under G.S. 135-3(8) or G.S. 135-5(a).

(f) Notwithstanding the foregoing, employees of the State Employees Association of North Carolina, the employees of the North Carolina Association of Educators, and the employees of the North Carolina School Boards Association who are in service and members of the Retirement System on June 30, 1985, shall, on or before October 1, 1985, make an irrevocable election to exercise one of the three options provided in G.S. 135-27(e).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CIVIL ACTION NO. 84-138-CIV-5

ROBERT P. ALMOND, *et al.*

Plaintiffs,

v.

HARLAN E. BOYLES, *et al.*

Defendants.

STIPULATIONS

The parties to this action, by and through counsel, hereby stipulate to the following facts and to the authenticity of the attached Exhibits, but make no stipulation as to the relevancy or admissibility thereof:

1. The North Carolina State Commission for the Blind (the "Commission") was created by legislative act in 1935. Around 1945, pursuant to N.C.G.S. §§111-27 and 111-27.1, the Commission began administering a vending stand program (the "program") designed to provide business opportunities for visually handicapped residents of North Carolina.

2. In 1955, the Commission was designated by the United States Department of Health, Education and Welfare ("HEW") as the agency to license blind persons for the operation of vending stands in North Carolina under the Randolph-Sheppard Act, 20 U.S.C. §107 *et seq.* *See* Exhibit 1 (this and subsequently cited Exhibits are attached hereto).

3. The program was administered by the Bureau of Employment for the Blind, an arm of the Commission, until 1974, when, pursuant to the Executive Reorganization Act

of 1973, the North Carolina Department of Human Resources ("DHR") succeeded the Commission and assumed its duties as licensing agency. Since then, the program has been administered by DHR through its Division of Services for the Blind (the "Division"). The Division operates solely under authority delegated to it by the Secretary of the Department of Human Resources.

4. In 1979, HEW's Rehabilitation Services Administration, the federal agency charged with supervision of the Randolph-Sheppard program, redesignated the North Carolina Department of Human Resources, Division of Services for the Blind as the North Carolina Randolph-Sheppard licensing agency. *See* Exhibit 2.

5. The Teachers' and State Employees' Retirement System, and its officials, agents, and employees, have never been designated agencies for licensing blind persons under the Randolph-Sheppard Act, and have never participated in contract or funding negotiations with the United States Government in relation to this Act nor had any administrative responsibility or authority under this Act.

6. At all times relevant herein, the costs of administering the vending stand program in North Carolina have been paid primarily with federal funds provided under the Vocational Rehabilitation Act, 29 U.S.C. §§701 *et seq.* The Vocational Rehabilitation Act establishes a joint Federal-State program under which the federal government will, up to a designated amount, match 4 to 1 (formerly 3 to 1) non-federal funding for purposes of vocational rehabilitation. In North Carolina, the non-federal share of the vending stand program budget has come from monies set aside from the vending stand proceeds, pursuant to the Randolph-Sheppard Act and regulations, as well as from vending machine profits. The amount of federal funds allocated to the program for fiscal years 1974 through 1983 is set out in Exhibit 3.

7. As a condition of using this federal funding for the vending stand program and receiving the designation as licensing agency, the Commission and the Division of Services for the Blind have agreed to administer the program in accordance with the Randolph-Sheppard Act and regulations promulgated thereunder.

8. The Randolph-Sheppard Act requires the state licensing to agree

> that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such state agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, as funds under this paragraph shall be set aside for such purposes: *Provided, however*, that in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary.

20 U.S.C. §107b(3). Provision (E) of this section, relating to retirement or pension funds, was added to the Randolph-Sheppard Act by amendment in 1974.

9. Prior to October 1, 1978, the State rules and regulations governing the administration of the North Carolina vending stand program provided that the licensing agency

could set aside funds from the proceeds of the stands, pursuant to 20 U.S.C. §107b, only for the purposes of (1) maintenance and replacement of equipment; (2) the purchase of new equipment; (3) management services; and (4) assuring a fair minimum return to operators. Effective October 1, 1978, these rules and regulations were amended to provide that stand proceeds could also be set aside for

> (5) the establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is so determined by a majority vote of blind operators licensed by the division, after the division provides to each such operator information on all matters relevant to such proposed purposes.

No vote has ever been held to determine whether a majority of the vendors wished to have funds set aside from stand proceeds for the purposes of providing pension or retirement benefits.

10. From July, 1971 through early 1978, the agency set aside 10% of the gross sales of each stand for purposes (1) through (4) identified in the preceding paragraph. From 1978 through June, 1980, the agency set aside 15% of stand net proceeds (total revenues minus cost of goods sold and operating expenses) for these purposes; since that time, it has set aside 20% of the net proceeds for these purposes. *See* Exhibit 4. The Agency has refunded to the vendors, on a pro rata basis, the unused portion of funds set aside, as reflected in Exhibit 5.

11. Prior to July, 1971, operators were paid a weekly salary (and bonuses). Since July, 1971, the State licensing agency has regularly collected the gross receipts of the vending stands, made deductions therefrom for various purposes, and distributed the balance to the vendors. At least since October 1, 1978, the licensing agency has provided to the vendors a monthly Statement of Revenue and

Expense showing all these deductions. *See* Exhibit 6. A portion of the funds set aside by the licensing agency from the net proceeds of the stands has been used to subsidize those vendors whose income otherwise would not equal or exceed a guaranteed minimum return established by the program.

12. The State regulations governing the program have always provided that title to all equipment, merchandise and other assets of the vending stands is vested in the licensing agency.

13. On June 21, 1968, the North Carolina Attorney General's Office issued an opinion letter stating that the Bureau and Bureau funds were subject to control by the Commission. (Exhibit A to the Answer of Defendants Morrow, Gruber, and Van Name.) On December 27, 1968, the Attorney General's Office wrote to the State Auditor concerning the vending stand program. (Exhibit B to the Answer of Defendants Morrow, Gruber and Van Name.) True copies of these letters are attached hereto as Exhibits 7 and 8.

14. Pursuant to Section 15 of the 1969-1971 North Carolina Appropriations Bill, Three Hundred Thousand Dollars ($300,000.00) of unobligated Bureau Reserve Funds, which the Bureau had placed in a special reserve account with the State Treasurer, were transferred into the State's General Fund, Operating Code 16041 (Commission for the Blind). A true copy of this legislation is attached hereto as Exhibit 9.

15. In 1969, the North Carolina General Assembly requested the Commission to review and make recommendations as to the personnel status of the vending stand operators and the manner in which best to provide them adequate retirement benefits. 1969 General Assembly Session Laws, Chapter 1255. A true copy of this legislation is attached hereto as Exhibit 10.

16. Pursuant to this directive, the firm of H. Gray Hutchinson and Associates performed an actuarial study on behalf of the Commission. In addition, George B. Buck Consulting Actuaries, Inc., recommended to the Retirement System that, should the vendors be brought under the Retirement System, an additional sum, over and above the assets of the private retirement trust fund, would be required to fund the prior service liability the Retirement System would thereby incur. True copies of the aforementioned study and recommendation, along with other documents relating to the the private retirement plan and trust are attached hereto as Exhibit 11.

17. In 1971, the General Assembly passed House Bill No. 407 entitled "An Act Relating to the State Commission for the Blind, to Clarify the Employee's Status of Blind and Visually Handicapped Employees of the Commission, to Enroll Such Employees in the Teachers and State Employees' Retirement System, and to Make an Appropriation Therefor." 1971 General Assembly Session Laws, Chapter 1025. This Act:

(1) Amended N.C.G.S. §111-27.1 by adding a new sentence at the end thereof, which reads as follows: "Blind or visually handicapped employees or vending stand operators employed by the North Carolina State Commission for the Blind, Bureau of Employment for the Blind Division, are hereby declared to be State employees."

(2) Amended N.C.G.S. §126-5(b) to exempt the vending stand operators from Chapter 126 of the General Statutes known as the State Personnel Act.

(3) Amended Chapter 135 of the General Statutes by inserting a new §135-16.1, which reads as follows:

> *Blind or visually handicapped employees.*—On July 1, 1971, all blind or visually handicapped employees employed by the State Commission for the Blind, Bureau of Employment for the Blind

Division, shall be enrolled as members of the Teachers' and State Employees' Retirement System. All such employees shall be given full credit for all service theretofore as employees of the State Commission for the Blind, Bureau of Employment for the Blind Division. All retired employees drawing or receiving benefits from and under the private retirement plan purportedly created on December 6, 1966, by the Bureau of Employment for the Blind Division pursuant to a trust agreement purportedly entered into with a private banking institution as trustee shall continue to be paid by the Teachers' and State Employees' Retirement System benefits in the same amount which they purportedly were entitled to under the private retirement plan and trust agreement, except that such retired persons shall be eligible for such annual cost-of-living increases as may be provided for retirement members of the Teachers' and State Employees' Retirement System under the provisions of this Article.

Upon the enrollment of the employees in the Teachers' and State Employees' Retirement System, the purported private retirement plan and trust agreement hereinabove referred to shall be dissolved and terminated.

(4) Provided for the transfer of the assets of the private retirement plan and trust agreement, which amounted to $163,490.09, to the Board of Trustees of the Teachers and State Employees' Retirement System.

(5) Provided for a one-time appropriation to the Teachers and State Employees' Retirement System out of the general fund of the State in the amount of $145,000 to fund the projected liability incurred by the System as a result of the other provisions of the Act.

A true copy of this legislation is attached as Exhibit 12. Pursuant to this legislation, the vendors were enrolled in the Retirement System.

18. At all times relevant herein, the "employer" contribution to the Retirement System (and to Social Security) for each vendor has been paid with funds deducted from the proceeds of the stand operated by that vendor.

19. Since 1971, no State funds have been appropriated for the vending stand program or for compensation or fringe benefits of the vendors, including the "employer" contributions to the Retirement System and Social Security.

20. On March 31 and June 1, 1977, HEW and the Division exchanged correspondence. True copies of that correspondence are attached hereto as Exhibit 13.

21. At least by November 15, 1978, the Division had entered into a written licensing agreement with each operator of the form attached to these Stipulations as Exhibit 14. The Division entered into identical agreements with all operators licensed subsequent to November 15, 1978, until a revised form agreement was adopted in April of 1984. *See* Exhibit 14a.

22. In connection with the 1981 Session of the North Carolina General Assembly, the Division proposed an expansion budget request seeking State funding of the vendors' employer contribution to the Retirement System. A true copy of this Expansion Budget Request is attached hereto as Exhibit 15.

23. In early 1982, representatives of the Division met with Merv Darter of the Rehabilitation Services Administration ("RSA"). Among the topics discussed at that meeting was the vendors' participation in the Retirement System. Following that meeting, Dr. Steven J. Cornett, the Regional RSA Commissioner and Mr. Darter's supervisor, wrote a letter dated March 26, 1982, to the Division,

a true copy of which is attached hereto as Exhibit 16. (Exhibit 1 to the Complaint.)

24. Following the receipt of that letter, on May 10, 1982, L. Earl Jennings, Jr., then Director of the Division, wrote to Dr. Sarah T. Morrow, Secretary of the North Carolina Department of Human Resources, concerning, among other things, the vendors' participation in the Retirement System. A true copy of that letter, and the attachments included therewith, are attached hereto as Exhibit 17.

25. In 1983, the General Assembly enacted Senate Bill 247. 1983 General Assembly Session Laws, Chapter 867. A true copy of the Bill is attached hereto as Exhibit 18.

26. Pursuant to this Act, licensed vendors who had been participating in the Retirement System were required to elect by September 30, 1983, (1) to continue contributing both the "employer" and "employee" shares to the Retirement System; or (2) to cease contributing to the System *and* (a) receive a refund of employee contributions plus statutory interest; (b) apply for and commence receiving a monthly retirement allowance; or (c) leave accumulated contributions in the System and retain the right to receive an actuarily reduced pension at some future date. *See* Exhibit 19. Exhibit 20 indicates the number of vendors exercising these various options as of October, 1983.

27. All documents attached as Exhibits to the Deposition of Stephen A. Johnson, former Chief of the Business Enterprises Section of the Division of Services for the Blind (with the exception of Exhibits 1 and 60-64 thereto), were produced to plaintiffs from the regularly maintained files of the Division.

This 29th day of November, 1984.

RUFUS L. EDMISTEN
Attorney General

/s/ WILLIAM F. BRILEY
Assistant Attorney General
North Carolina Department
of Justice
P. O. Box 27602
Raleigh, North Carolina 27602

Counsel for Defendants Morrow, Gruber, and Van Name

/s/ NORMA S. HARRELL
Assistant Attorney General
North Carolina Department
of Justice
P. O. Box 27602
Raleigh, North Carolina 27602

Counsel for Defendants Boyles, Ballard, Bridges, Byrd, Covington, Davis, Jakes, Jernigan, Jones, Morton, Osborne, Phillips, Pitt, Rader, Board of Trustees of the North Carolina Teachers' and State Employees Retirement System, and E. T. Barnes

SANFORD, ADAMS, MCCULLOUGH
& BEARD

/s/ STEVEN J. LEVITAS
P. O. Box 389
414 Fayetteville Street Mall
Raleigh, North Carolina 27602
(919) 828-0564

Counsel for Plaintiffs

Charles R. Hassell, Jr.
500 Capital Club Building
16 West Martin Street
Raleigh, North Carolina 27602
(919) 828-8746

Counsel for Plaintiffs